QUARTERLY REPORT

Of the

ATTORNEY GENERAL

Of

ALABAMA

For the Period

July 1, 1944

Through September 30, 1944

Volume XXXVI

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General From July 1, 1944, through September 30, 1944.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Acting Attorney General.

Very respectfully,

WILLIAM N. McQUEEN,

WETUMPKA PRINTING CO.
Printers and Publishers
Wetumpka, Ala.
1944

OPINIONS

July 5, 1944.

Hon. Wm. W. Hill,

Judge of Probate,

Montgomery County,

Montgomery, Alabama.

Veterans—Incompetent Veterans—Veterans' Hospitals—Code 1940, Title 45, §§ 210, 211; Tit. 21, §§ 168, 175—Quarterly Rep. Attorney General, Vol. XV, page 294 modified—

Upon commitment by the Judge of Probate of an incompetent veteran to a veterans' hospital. it should be ascertained whether he is indigent, and if indigent the expense of transporting the veteran is payable by the county; otherwise by the veteran's ward as a proper charge against his estate.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of June 23, 1944, is as follows:

"A question has arisen as to the pay for transmission of an incompetent veteran to the Veterans Hospital. It seems that under the Veterans regulations it does not pay the expenses of the officer transmitting the incompetent. This, however, is under the rules of the Veterans Administration and not of any State Statute.

"Please advise me as to whether or not he should be paid for the same as if he went to the State Institution.

"I call your attention to Chapter 8, Title 21, Section 160 et seq. and especially to Section 175 as to how we get them into the Veterans Hospital.

"Does the same rule apply as to appointment of an individual to carry them to the Veterans Hospital as it does to the State hospital?"

The Judge of Probate upon a hearing before him as to the sanity of a person alleged to be of unsound mind is, under certain conditions, authorized to commit such person to a U. S. Veterans' Hospital if such person is entitled to admission thereto. And upon commitment of such person to a hospital the Judge of Probate is further required to appoint some person or persons, whether officers or not, "as he may see fit, to convey the patient to the hospital." The expense of conveying **indigent patients** to a hospital is payable by the county "on order from the county commissioners." Code 1940, Tit. 45, **§§ 210, 211.**

Code 1940, Tit. 21, § 175 also prescribes the procedure for admission of incompetent veterans to a veterans' hospital,—without reference however to payment of the expense of transportation.

From the foregoing it is clear that the county is authorized to pay the expense of transporting the veteran to the veterans' hospital in case he is found to be indigent, and not otherwise. Whether he is in fact indigent is to be determined by the Judge of Probate upon the hearing prescribed by Title 45, Section 210, supra, after examination of witnesses and investigation of the facts of the case, as thereby required.

In an opinion rendered June 16, 1939, to Hon. John S. Golson, Judge of Probate, Butler County, (Quarterly Report, Attorney General, Vol. XV, p. 294) it was held, without qualification, that such expense of transportation to a veterans' hospital was payable by the county, without reference to the fact whether the patient was indigent or not. That opinion is modified therefore to the extent that the county is authorized to pay such expense only in case the patient is indigent—a fact to be ascertained by the Judge of Probate, when the order of commitment is made, and a person or persons are appointed by him to convey the patient to the hospital.

It naturally follows that if the veteran, when committed, is not indigent, the expense of transportation is a proper charge against his estate, payable by his guardian as other claims against the ward's estate, Code 1940, Tit. 21, § 168.

In conclusion it may be proper to remark that Act No. 575, H. 421, approved July 7, 1943, (Gen. Acts 1943, p. 578), fixing the compensation of Sheriffs for transporting insane persons, is without application. That Act by express terms applies only to transportation "to a State Hospital for the insane." Should a sheriff be appointed to transport the veteran to a veterans' hospital, pursuant to Title 45, § 211, supra, he can look to the county for payment of the expense only in case the veteran is found to be indigent upon the hearing before the Judge of Probate. Otherwise the sheriff must look to the veteran's estate for payment.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 10, 1944.

Hon. Clyde C. Pearson, Secretary,

Board For Registration of Architects,

817-18 First National Bank Building,

Montgomery, 4, Alabama.

Board of Registration of Architects is not justified in preferring criminal charges against a non-registered architect in the absence of proof of venue.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of June 29, 1944, is as follows:

"This board has information that plans and specifications have been prepared for an addition to the Jackson County (Florida) Hospital located at Marianna, Florida and for the Nurses Home and Laundry for the same hospital by Mr. Jerome A. Spann, of Dothan, Alabama.

"Mr. Spann is not a registered architect in the state of Alabama nor is he a registered architect in the state of Florida. This board desires to obtain from you an opinion as to whether or not Mr. Spann is violating the registration law in this state, Code of Alabama 1940, Titles 46-51, amended by Regular Session of Legislature 1943.

"Mr. Spann's residence is in Dothan, Alabama and while we have no proof that plans were prepared in Alabama it is presumed that he did prepare them in Alabama, although the projects are to be built in the state of Florida. If this board has jurisdiction it desires to bring a case against Mr. Spann for violation of the law.

"I am enclosing copies of the following letters for your information. Letter from Mellen C. Greeley, Secretary-Treasurer of the Florida State Board of Architecture to Mr. Spann, dated May 12, 1944. Letter from Mellen C. Greeley to the writer, dated June 20, 1944.

"A registered architect in this state advises that he has seen the plans and that they bear the following title:

ADDITIONS TO JACKSON COUNTY HOSPITAL

MARIANNA, FLORIDA

(3 sheets)

Drafted by Jerome A. Spann

Dothan, Alabama December 31, 1943

NURSES HOME

JACKSON COUNTY HOSPITAL

MARIANNA, FLORIDA

(2 sheets)

Drafted by Jerome A. Spann

Dothan, Alabama December 31, 1943

. . . . . .

LAUNDRY

JACKSON COUNTY HOSPITAL

MARIANNA, FLORIDA

(1 sheet)

Drafted by Jerome A. Spann

Dothan, Alabama December 31, 1943

"He also states that neither the drawings nor the typewritten specifications for the three jobs contain any seal."

I regret being unable to answer your inquiry either in the affirmative or the negative.

A prosecution of the type mentioned must be instituted under the provisions of Title 46, Section 18, Code of 1940, making the violation of any provisions of Chapter 2, Title 46, a misdemeanor. The 1943 Legislature amended Section 8 thereof to read pertinently as follows:

> "In order to safeguard life, health and property no person shall practice architecture in this State, or use the title 'Architect' or any title, sign, card or device to indicate that such person is practicing architecture or is an architect unless such person shall be registered as an architect as hereinafter provided and shall thereafter comply with the provisions of this Chapter." (Acts of 1943, page 191.)

Particular attention is called to the paragraph of your letter wherein you state:

"While we have no proof that plans were prepared in Alabama, it is presumed that he did prepare them in Alabama, although the projects are to be built in the state of Florida."

In my opinion, the Courts will not concur in your presumption; in fact, it has been held that "there being a total absence of proof of venue, a conviction cannot be sustained." **Thompkins v. State,** 1 Ala. App. 258, 55 So. 267; **Walker v. State,** 153 Ala. 31, 45 So. 640; **Shores v. State,** 25 Ala. App. 351, 146 So. 537.

Mr. Spann's innocence or guilt will depend upon his conduct in Alabama, and if you have no evidence that he committed any act prohibited by Section 8, as amended, supra, within this State, you certainly would not be justified in preferring charges against him.

The factual situation also presents other serious questions as to the propriety of preferring charges which may or may not be applicable in the event you obtain evidence of any acts Mr. Spann may have committed within Alabama, and for that reason need not be discussed here.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 11, 1944.

Hon. H. G. Dowling,

Commissioner of Revenue,

Department of Revenue,

Montgomery, 2, Alabama.

Licenses—Code 1940, Title 51, § 529—

Vendors, wholesale or retail, of melons, such as watermelons and cantaloupes, from a fruit stand, store or other established place of business are not subject to the tax imposed by Code 1940, Tit. 51, § 529, provided their sales are confined to the sale of such melons and do not include fruits.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of June 29, 1944, is as follows:

"Re: Fruit dealers, wholesale and retail, identified by Section 529, Title 51, 1940 Code of Alabama

"During the months of June, July and August of each year about twenty-five or more persons engage in selling watermelons and fruits from definite stands or places of business within the city of Birmingham, Alabama. Some of these dealers engage in an exclusive wholesale business to other dealers, some engage in a retail business, while others engage in wholesale and retail selling.

"Section 529, Title 51, 1940 Code of Alabama provides in part as follows

"529. Fruit Dealers.—For each person selling fruit from a fruit stand, store or other established place of business, in cities or towns of over ten thousand inhabitants $10.00; and in all other places whether incorporated or not $5.00.

"Kindly advise this office as follows:

"(1) Is a person engaged in selling watermelons from a stand or building in a city of more than ten thousand inhabitants liable for a license of $10.00 per annum, under the above identified statute?

"(2) Is a person engaged in making wholesale sales, to local dealers, liable under the same Section and circumstances for a license tax in the same amount?

"(3) Are the provisions of Section 529 applicable to dealers in watermelons and cantaloupes?

"(4) Does the word 'dealers' as used in the identified statute apply to wholesale and retail vendors of watermelons, cantaloupes and fruits?

"Since the season is well under way and none of these vendors have ever been required to pay license under the above identified Section, I would appreciate an opinion as soon as circumstances will permit."

The essential question is whether the word fruit as used in Code 1940, Tit. 51, § 529, includes melons such as watermelons and cantaloupes, and whether sale of such melons is clearly sale of fruit.

If there is reasonable doubt as to the question the doubt must be resolved in favor of the taxpayer. Revenue statutes of doubtful meaning must be so construed. **State v. Coastal Petroleum Co.**, 240 Ala. 254, 198 So. 610; **U. S. v. Merriam**, 263 U. S. 179, 68 L. ed. 240, 29 A. L. R. 1547.

It has been said that tax statutes should not be extended by implication nor enlarged by construction to embrace matter not specifically pointed out

therein. **Mead Corp. v. Comm'r of Internal Revenue,** 116 Fed. 2d 187 (1940).

From your letter it appears that heretofore "none of these vendors have ever been required to pay license under the above identified section," from which I infer that said section has heretofore for a considerable period of time been impressed with an administrative, or practical, construction, and has been construed by your department and its predecessor, the State Tax Commission, as not including vendors of melons merely.

It is very doubtful in my opinion whether melons, in common parlance, can be called fruit. There is a well defined difference between fruit and vegetables. If a melon must be classified either as one or the other I would incline to consider it a vegetable rather than a fruit. It certainly more nearly resembles a vegetable than a fruit. In **Webster's Unabridged International Dictionary** it is said:

> "In popular usage there is no exact distinction between a **fruit** and a **vegetable,** except where the latter consists of the stem, leaves, or root of the plant. Thus the apple, pear, orange, lemon, peach, plum, grape, banana, persimmon, pineapple, and most berries are generally recognized as fruits; the pea, bean, pumpkin, squash, eggplant, cucumber, etc. are vegetables; while the tomato, melon and rubard are variously regarded."

In a Georgia case it was said: "Some question is raised as to whether the watermelon is a fruit or a vegetable. **We think that it is both.** Generically it is included within the genus vegetable, and still it is a **species of fruit."** (Emphasis added). **Massey v. City of Columbus,** 70 S. E. 263, 264 (Ga. Ct. of App. 1911). No authority was cited by the learned judge for this amazing statement. It is contrary to common understanding, and in my opinion farfetched.

The rule to be applied has been thus expressed in a recent decision:

> "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." Addison v. Holly Hill Fruit Products, ... U. S. ....., 88 L. ed. 1123, 1129(6).

It is to be noted that Section 529, supra, was brought into the Code of 1940, without change of verbiage, from the Revenue Act of 1935 (Acts 1935, p. 462, Sch. 66). With the administrative construction impressed upon schedule 66 the codifiers and the legislature re-enacted it into the current revenue act or code, although if they saw fit they might readily have clarified its meaning or have expanded its content by inserting the words "and melons" next after the word "fruit."

Administrative construction is entitled to great weight in the case of ambiguous statutes, and re-enactment of a statute after it has been administratively construed by the highest officials charged with the duty of administration of tax laws should be given favorable consideration, especially if unchallenged for a considerable length of time. **State v. Tuscaloosa, etc.,** 230 **Ala. 476, 161 So. 530, 99 A. L. R. 1019; Kern River Co. v. U. S.,** 257 U. S. 147, 66 **L. ed. 175.**

No good reason therefore appears for departure from the construction heretofore indulged by your department. If the tax imposed by Title 51, Section 529, is to be extended to the vendors of melons the legislature, rather than the department, should make the extension. I am of the opinion that the vendors of melons exclusively, whether at retail or wholesale, are not subject to the tax.

The answer to all four of your questions is "No," provided the vendors therein referred to confine their sales to melons, and are not engaged also in selling fruits in connection with melons.

Incidentally it may be said that the foregoing restricted construction of Section 529 is supported by the verbiage of Section 530 next thereafter. In that section a license tax is, under certain conditions imposed on the vendors, both wholesale and retail, not only of "fruits" but also of "vegetables, produce or other commodities,"—thus evincing in the legislative mind a marked and decided distinction between "fruit," and "produce or other commodities," such as melons for the purposes of license tax.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 11, 1944

Hon. Sim L. Howell, Chairman,

Morgan County Board of Revenue and Control,

Decatur, Alabama.

Counties—Courts of County Commissioners—Notices—Newspapers—Limitation of Actions—Title 7, Section 718, Title 12, Section 118, Code of Alabama 1940.

Claims for publication of lists of confederate pensioners and notice of proposed legislation must be filed with the governing body of the county within twelve months from the date they accrue; otherwise, they are barred under the provisions of Title 12, Section 118, Code of Alabama 1940.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of June 28, 1944, is as follows:

"The Decatur Daily, the publisher of a newspaper, in Morgan County, Alabama, on June 26, 1944, filed with me, as Chairman of the Board of Revenue and Control, a claim in the sum of $225.25 based on the following items.

"1. A publication by it on January 20, 1943, of a list of Confederate pensioners, the cost of publication being $3.71.

"2. A publication by it of notices of three local bills, the last publication being on June 9, 1943. One of which was a bill to provide for a trial tax on proceedings brought in the Morgan County Court of Morgan County, Alabama. One of which was a bill to authorize the Board of Revenue and Control of Morgan County, Alabama, to provide the Sheriff of Morgan County with deputies and jailers. And the other of which was a bill to amend Section 11 of an Act of the Legislature of Alabama creating the Board of Revenue and Control of Morgan County, approved March 9, 1939. The cost of the publication of notice of said three bills being $44.69.

"3. The publication of a notice of a local bill to amend an Act placing the Tax Collector of Morgan County on a salary, and the publication of a notice to amend an Act placing the Tax Assessor of Morgan County on a salary, and the publication of notices of three local bills with reference to placing the Probate Judge of Morgan County on a salary. The last publication of these five notices being on May 7, 1943, and the cost of publication being $176.85.

"The Board desires to pay the above claim unless it is barred on account of not having been presented within twelve months after its accrual. I realize that it is not necessary that a claim be filed concerning certain matters, and I am wondering whether or not the fact that the Statute provides the legal rate for publication, and the fact that the newspapers containing these publications become public records filed in the Office of the Judge of Probate, the Clerk of the Circuit Court and the Register of the Circuit Court, and the fact that copies of the publications are spread on the House and Senate Journals would bring the above claim within that class as to which it is not necessary that the claimant file a verified claim within twelve months after the accrual.

"Please advise me whether or not the above claim can be legally paid."

It is my opinion that the payment by the county of the claims enumerated in your inquiry is barred under the provisions of Title 12, Section 118, Code of Alabama 1940. Section 118 is as follows:

"§ 118. Claims barred if not presented.—All claims against counties must be presented for allowance within twelve months after the time they accrue, or become payable, or the same are barred, unless it be a claim due to a minor, or to a lunatic, who may present such claim within twelve months after the removal of such disability."

Two exceptions to the above quoted statute have been recognized by the Supreme Court of this State. These two exceptions are set out in the case of **State v. Board of Revenue and Road Commissioners of Mobile County,** 180 Ala. 514, 61 So. 815, in the following language:

"Where special laws in express terms or by necessary implication provide for a different mode of dealing with such claims, that mode is, of course, to be followed, through in derogation of the general statutes and policy of the state. Dale County v. Gunter, 46 Ala. 134; Commissioners v. Rather, 48 Ala. 433. And, again, where the law itself determines the fact and the amount of the claim, leaving nothing to be ascertained or determined by the county board, it is generally held that presentment for audit, and allowance or rejection, is not contemplated nor required. Caldwell v. Dunklin, 65 Ala. 461; Shinbone v. Randolph County, 56 Ala. 183."

In view of the exceptions set out above, this office has held (1) that claims, the amount of which is fixed by statute, do not have to be presented to the governing body of the county within twelve months from the time they accrue (Quarterly Report of the Attorney General, Volume 14, page 123), and (2) that claims, the amount of which is not fixed by statute, and for this reason must be itemized, audited and allowed by the governing body of the county, must be presented within twelve months from the time they accrue (Quarterly Report of the Attorney General, Volume 14, page 142, 144).

The claims under consideration do not fall under either of the exceptions to Section 118, supra. They are claims that must be itemized, audited and allowed. The fact that the legal rate of publication is fixed by statute (Title 7, Section 718, Code of Alabama 1940) does not alter this conclusion. This statute merely fixed the maximum amount that may be charged per word for such publication. The amount due for a particular publication cannot be determined by only referring to the statute. The amount depends upon the number of words in the publication and the number of times it was inserted. Neither does the fact that such publications become public records have any bearing on the conclusions reached therein.

The claims under consideration falling within that class of claims that must be itemized, audited and allowed by the governing body of the county, the failure to present the same within twelve months from the time they accrue, bars their payment under the provisions of Section 118, supra.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 21, 1944.

Hon. J. F. Craig, Clerk,

Walker County Board of Revenue,

Jasper, Alabama.

Schools—County Superintendent of Education—Counties—Courts of County Commissioners—Walker County—Title 52, Section 130, Code of 1940.

The Board of Revenue of Walker County, under the provisions of Title 52, Section 130, Code of 1940, must furnish forms for teachers' applications when the same are required by the county superintendent of education, the expense therefor being payable from the general fund of the county.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of July 17, 1944, is as follows:

"We have been called on by the Board of Education to furnish 2000 Teachers applications. Would appreciate if you will advise if these applications should be furnished by the Board of Revenue from General Funds or should they be purchased through the Board of Education from the school Funds."

It is my opinion that the Board of Revenue of Walker County should provide the teachers' applications referred to in your request, the expense of which should be paid from the general fund of the county.

Your attention is called to Title 52, Section 130, Code of Alabama 1940, which provides in part as follows:

" *** The county board of revenue or court of county commissioners shall also provide necessary furniture, office equipment, stationary, postage, forms, and supplies required by the county superintendent of education and his assistants. *** "

In an opinion to Hon. Alex Brantley, Judge of Probate of Pike County, under date of November 14, 1935, Biennial Report of the Attorney General, 1934-1936, page 372, the word "forms" as used in the above quoted statute was construed to include all forms required by the superintendent of education.

Therefore, it is my opinion that said Section 130 expressly places the duty upon the Board of Revenue of Walker County to supply form for teachers'

applications when the same are required by the county superintendent of education, and the expense therefor shall be paid from the general fund of the county.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 25, 1944.

Hon. W. H. MacGregor,

Teachers' Retirement System Division,

State Education Department,

711 High Street,

Montgomery, Alabama.

Schools—County Superintendent of Education—Teachers' Retirement System—Blount County—Title 52, Sections 103-109, 362, 364, and 366, Code of Alabama 1940—Act No. 345, Local Acts of Alabama 1923, page 237—Act No. 419, General Acts of Alabama 1939, page 559.

1. County superintendents of education, whether elected or appointed, are subject to the provisions of the Teachers' Retirement System.

2. The County Superintendent of Education of Blount County, having qualified, been nominated, elected, and assumed the duties of his office, before the proclamation of the Governor on September 1, 1941, on which date the Teachers' Retirement System became operative, is not compelled to retire because he has attained the age of seventy years, but may serve out the current term for which he was elected.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of June 26, 1944, is as follows:

"**In Re:** Compulsory Retirement of a County Superintendent Prior to Expiration of Term of Office Defined in Local Law Authorizing Election of said Superintendent

"Compulsory Retirement is defined in Section 366, Title 52, Code of Alabama, as amended by Act 61, approved June 1, 1943. This section in pertinent part reads:

> " 'Any member in service who has attained age seventy shall be retired forthwith, provided that with the approval of his employer he may remain in service until the end of the school year following the date on which he attains age seventy.'

"The County Superintendent of Blount County was elected by the direct vote of the people of said County in the general election of 1940 to a term of office beginning July 1, 1941, and ending June 30, 1945. Said Superintendent who had attained age seventy prior to date of general election of 1940 is included in the membership of the Retirement System under Active Register No. 16268.

"I should like to have your official opinion in reply to the following questions.

"(1) Is the County Superintendent of Blount County required under provisions of the Retirement Law to be retired from active service with a retirement allowance which shall begin to accrue as of July 1, 1944?

"(2) If your reply to the first question is in the negative, then, will the claim on the funds of the retirement System which has been established by the County Superintendent of Blount County as a member of the Retirement Plan continue in force until the expiration of his term of office on June 30, 1945, thereby securing to him the benefits which he will be eligible to receive upon making application for service retirement, effective July 1, 1945?"

In answer to your first inquiry, it is my opinion that the County Superintendent of Education of Blount County is not required by law to retire from active service during the present term for which he was elected, notwithstanding the fact that he has attained the age of seventy years.

Title 52, Section 366, Code of Alabama 1940, provides that any member in service who has attained the age of seventy shall be retired forthwith, provided that with the approval of his employer he may continue in service until the end of the school year following the date on which he reached the age of seventy years. Under the provisions of Title 52, Section 364, Code of Alabama 1940, the membership of the Teachers' Retirement System specifically includes all persons who shall become teachers after the date of establishment of said System, and all persons who were teachers at the date of such establishment and who did not elect to come without the Teachers' Retirement System. Title 52, Section 362, Code of Alabama, defines the term "teacher" as follows:

> " *** any teacher, principal, superintendent, supervisor, college professor, administrative official, or clerk employed in any public school or public college within the State, or any similar employee or officer of the department of education or of the Alabama Educational Association, or

any attendance worker, fifty per cent or more of whose salary is paid from public school funds, or any employee receiving a regular stated compensation from the retirement system. *** "

By the above provisions of law, it can be seen that not only was the teachers' Retirement System intended to apply to all persons holding positions in our public school system, but also county superintendents of education who were elected by the people.

As to county superintendents of education elected by the people, the actual effect of the provision requiring retirement at the age of seventy years imposes an additional qualification upon a person seeking such office. Therefore, the duty is imposed upon the State Superintendent of Education, when certifying the qualifications of candidates for the office of county superintendent of education under the provisions of Title 52, Sections 103-109, Code of Alabama 1940, to ascertain whether or not such candidate meets the additional qualification as to age imposed by the Teachers' Retirement System.

However, under the facts set out in your letter, it is my opinion that the above conclusions are inapplicable to the County Superintendent of Education of Blount County during his present term of office.

The Teachers' Retirement System was created by Act No. 419, General Acts of Alabama of 1939, page 559, and was approved on September 15, 1939, and brought forward into the Code of Alabama of 1940 as Title 52, Chapter 410. However, in order to postpone the effective date of the Act until such time as sufficient funds had been accumulated for carrying out the purposes thereof, Section 2 of said Act provided in part as follows:

" *** The retirement system so created shall be established as of October first, nineteen hundred and forty, or as soon thereafter as the Governor by proclamation declares the funds accruing to the Teachers' Retirement System of Alabama are sufficient to meet the obligations of the 'normal contribution' on October 1st, of a year following October 1st, 1940. *** "

The Governor issued the proclamation provided for by Section 2, supra, on September 1, 1941, at which date the Teachers' Retirement System first began its operation.

The County Superintendent of Education of Blount County is elected under the provisions of Act No. 345, Local Acts of Alabama, 1923, page 237, and by the provisions of said Act, must possess the qualifications required by the general laws of this State relating to the election of county superintendents of education. For his present term of office, it was necessary for the County Superintendent of Education of Blount County to qualify before March 1, 1940, as provided by the general law. He duly qualified before this date as a candidate for nomination in the May Primary of 1940, was duly nominated at said Primary, was duly elected in general election held in November of the same year, and assumed office on July 1, 1941. Thus he qualified, was nominated, elected, and assumed the duties of his office before the proclamation of the Governor on September 1, 1941, on which date the Teachers' Retirement System became operative.

Inasmuch as on the date of his qualification, nomination, election and assumption of office, the county superintendent of education had met all existing qualifications for his office and there was no way in which there could be ascertained the effective date of the Teachers' Retirement System, the same being contingent upon the Governor's proclamation, it is my opinion that the Legislature did not intend that the qualification as to age subsequently imposed on the effective date of the Teachers' Retirement System should operate to prevent him from serving the entire term for which he had been duly elected.

It is my opinion that your second inquiry should be answered in the affirmative.

In view of the above conclusions that the County Superintendent of Education of Blount County is not required to retire before completing his present term of office, and there appearing no provision in the Act creating the Teachers' Retirement System for a forfeiture of any claims against the fund upon failure to retire at the age of seventy years, the County Superintendent of Education of Blount County will be entitled to the benefits accruing to him under said Act at the expiration of his term of office on July 1, 1945.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 25, 1944.

Hon. B. W. Simmons,

Circuit Solicitor,

22nd Judicial Circuit,

Covington County,

Andalusia, Alabama.

Code 1940, Tit. 13, § 240—Circuit Solicitors—Expenses—Mail Box.

Circuit Solicitors entitled to reimbursement by the State of the expense of post-office box rental, when box is used exclusively for receipt and delivery of official mail in connection with maintenance of office in counties where they reside.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of July 15, 1944, is as follows:

"I occupy an office upstairs in the Court House at Andalusia. There is no city mail delivery service to my office—upstairs—and am compelled to rent a postoffice box here to insure delivery of my official mail, and for no personal convenience inasmuch as I maintain a personal box at Opp, Alabama, where I live.

"Am I entitled to reimbursement for box rent under Title 13, Section 240. The comptroller has declined to reimburse me.

"The use of the words, stationery, stamps, and other necessary equipment indicates a legislative intention to furnish a Circuit Solicitor with supplies and other incidents pertinent to proper mail service."

The effect of Act No. 329, H. 147, approved Aug. 31, 1939 (Acts 1939, p. 468) was to impose upon circuit solicitors, and other solicitors therein named, additional duties, to increase their compensation, and to require them to devote all their time to the discharge of their official duties, by forbidding them to engage in the private practice of law.

By Section 3 of this Act (Code 1940, Tit. 13, § 240) counties are required to furnish such solicitors suitable offices in the counties where they reside, and the State is required to provide them with "telephone service, stationery, stamps and other necessary equipment."

Obviously the law makers thereby intended to provide for payment of whatever expense such solicitors might incur by reason of correspondence with other persons in the discharge of official duty.

This office has held that the county's obligation to provide suitable offices carries with it the obligation to provide also light and janitor service as a necessary incident to maintaining such offices. **Quarterly Report, Attorney General, Vol. 29,** p. 108.

Likewise I am of the opinion that the State's obligation to furnish the impediments of oral and written communication and correspondence such as "telephone service, stationery, stamps and other necessary equipment," carries with it by implication the obligation to pay for the rental of a post-office box, as a part of such equipment, wherever, as in your case, the box is used exclusively for your official mail, and its use is reasonably necessary for the receipt and delivery of your official mail. See also **Quarterly Report, Attorney General, Vol. 20, p. 104.**

In that opinion it was said that the words "other necessary equipment," required to be furnished solicitors by the State, "includes whatever things are proper, useful and suitable to the office of the solicitor in furtherance of the discharge of the duties imposed upon him by law."

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 26, 1944.

Hon. T. C. Garner, Treasurer,

Jefferson County,

Birmingham, Alabama.

Jefferson County—Employees—Merit System—Vacation—Title 7, Section 666, Title 12, Section 151, Code of 1940—Section 97, Constitution of Alabama of 1901.

Personal representative of deceased employee of Jefferson County who was subject to Civil Service Act is entitled to receive payment for accumulated vacation earned by such deceased employee.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of July 17, 1944, is as follows:

"Your official opinion is requested as to whether or not an employee of Jefferson County can legally receive pay for accumulated vacation after the date of his death.

"During the past few years several claims have been filed with the County Commission, and me as Treasurer of Jefferson County, after the death of an employee for vacation which was accumulated to the credit of the employee prior to the date of his death. Payment of claims of this nature have been questioned by me because I could not see how a valid claim could be filed by the deceased or his heirs for any amount other than actual services rendered to the County."

It is my opinion that the personal representative of a deceased employee of Jefferson County is entitled to receive payment for such employee's accumulated vacation, the proceeds of which shall be administered by such personal representative as provided by law.

The Civil Service System under which Jefferson County operates is found in Title 12, Chapter 12, Code of Alabama 1940. The allowance of vacation with pay as provided for in Title 12, Section 151, Code of Alabama 1940, is as follows:

> "§ 151. Leaves and absences.—All permanent employees holding regular full time positions under the jurisdiction of this chapter shall be allowed a vacation with pay at the rate of one work day per month of service. Such vacation allowance shall be cumulative to not to exceed twenty-six work days. The time for such vacation shall be determined by the appointing authority except that the employee, if a vacation has not been allowed him during the calendar year, may demand that he be given a vacation not exceeding twelve work days. Employees who resign in good standing or who are separated from the service without fault or delinquency on their part shall be allowed credit for vacation earned. Any employee who is dismissed for cause shall forfeit all vacation allowances. The rules and regulations shall contain provisions for granting permanent employees sick leave with pay and for leave without pay."

The obvious intent of the above quoted Section 151 is the granting to an employee subject thereto either a vacation with pay, or, if he so chooses, payment of his salary for the unused portion of his vacation upon termination of his employment. The only specific condition by which an employee forfeits his right to such vacation is dismissal for cause. Therefore, subject only to this condition, he acquires a vested right in any earned vacation, and the allowance of such vacation is as much a part of his contract of employment and compensation for service rendered as his regular salary.

In the case of **Cobbs v. Home Insurance Company v. New York,** 18 Ala. App. 206, 91 So. 627, the Supreme Court of Alabama supported the above conclusion by holding that a pension for firemen in certain municipalities provided for by statute was not a gratuity, but constituted a part of the stipulated consideration for which such firemen contracted and served. The fact that benefits accrued and were payable to the fireman's heirs at law in the event of his death was immaterial, for the reason that such benefits were actually earned by the fireman during the term of service.

Furthermore, the Cobbs case held that Section 97, Constitution of Alabama of 1901, prohibiting the Legislature from authorizing payment to any person of the salary of a deceased officer beyond the date of his death, was inapplicable, for the reason that the term "officer" as used therein contemplated a public officer exercising certain independent public duties incident to an office created by law, carrying with it a part of the sovereignty of the State.

It is my opinion that the vacation allowed employees of Jefferson County by said Section 151, is not a gratuity, but constitutes part of the compensation payable to them for services rendered, that such employees are not "officers" within the meaning of the term as used in Section 97, Constitution of Alabama of 1901, and that the personal representative of a deceased employee is entitled to receive payment for the accumulated vacation earned by such deceased employee.

In the event that the amount of such earned vacation does not exceed $100.00, such amount, instead of being payable to the personal representative

of a deceased employee, may be paid under the provisions of Title 7, Section 666, Code of Alabama 1940, which is as follows:

"§ 666. Wages and salary of deceased employee, to the amount of one hundred dollars, paid to widow and exempted.—Whenever an employee of another shall die intestate and there shall be due him as wages or salary, a sum not exceeding one hundred dollars, the debtor may discharge himself from liability therefor by paying such amount to the widow of the deceased employee, or, if there be no widow, to the person having the actual custody and control of his minor child or children, or either, as the case may be, who may sue for and recover the same as part of the one thousand dollars in personalty exempted to them."

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 26, 1944.

Hon. B. G. Farmer, Sheriff,

Houston County,

Dothan, Alabama.

Sheriffs—Costs and fees—Informer's fees—Intoxicating Liquors—Department of Corrections and Institutions—Title 29, Sections 102, 257, and 258, Title 45, Sections 69 and 70, Code of Alabama 1940—Act No. 7, General Acts of Alabama 1919, page 6—Act No. 681, General Acts of 1919, page 983.

1. When a person is convicted of unlawfully distilling or manufacturing or making prohibited liquors or beverages, the sheriff or other officer or person furnishing evidence leading to such conviction is entitled to the sum of $50.00 which shall be paid from the convict fund, when such person is sentenced to the penitentiary. Where the defendant is sentenced to hard labor for the county, said sum is payable from the general fund of the county.

2. An opinion rendered to Hon. E. P. Russell, Director of the Department of Corrections and Institutions, under date of April 3, 1944 (M. S.), in which a contrary conclusion was reached, is hereby expressly overruled and withdrawn.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of April 26, 1944, is as follows:

"On April 3, you rendered to Hon. E. P. Russell, Director Department of Corrections and Institutions, an opinion, that 'The $50.00 authorized to be paid as a part of the cost bill in a conviction in "distilling cases" in the Circuit court, as provided in Title 29, Sec. 102, cannot be paid from any funds of Department of Corrections and Institutions, nor is said section an appropriation for the payment of same so that this item of cost may be paid from any other State fund.'

"I will thank you to reconsider this opinion in the light of the case of **Moseley v. Kennedy**, 17 So. (2d) 536, rendered by the Supreme Court of Alabama some ten days after the release of said opinion."

In answering your request, the opportunity is taken to fully review all aspects of this question, and especially the effect thereon of the case of **Moseley v. Kennedy**, 17 So. (2d) 536.

Title 29, Section 102, Code of Alabama 1940, is as follows:

"§ 102. Fifty dollars allowed sheriff or officer furnishing evidence to support conviction taxed as costs.—Whenever any person is convicted in the circuit court of unlawfully distilling or manufacturing or making any of the prohibited liquors or beverages as defined by this title, there shall be charged in the bill of costs to be paid and collected as other items of cost, the sum of fifty dollars, to be allowed the sheriff or other officer or person who furnished the evidence and brought about the conviction, and who shall satisfy the presiding judge that he is the person entitled to said sum, and shall receive from the judge a certificate to that effect."

The original enactment of this statute, which was in substantially the same language as the above quoted Section 102, is found in Section 10 of Act No. 7, General Acts of Alabama 1919, page 6, which was approved on January 25, 1919.

At the time of the enactment of this statute, there existed no other statute prescribing a manner by which this sum could be paid. Therefore, the provision that it "shall be charged in the bill of costs to be paid and collected as other items of costs" manifestly contemplated that it be paid either by the defendant or, in the event of his insolvency, from the fine and forfeiture fund of the county. There was no other fund, state or county, from which this sum was authorized to be paid.

However, in Act No. 681, General Acts of Alabama, 1919, page 983, which Act was approved and became a law on September 29, 1919, nearly a year after the passage and approval of said Act No. 7, the Legislature expressly designated the manner in which this sum of $50.00 should be paid. This Act is as follows:

"Section 1. That in all cases provided by statute where a sum of money is allowed in the nature of a fee or reward and is made payable to any person who furnished the evidence that brought about the conviction of the person charged and convicted of the offense of unlawfully distilling or manufacturing or making prohibited liquors and beverages, said sum shall be payable out of the Convict Fund on presentation to the State Auditor of a certificate from the President of the Board of Convict Inspectors to the effect that the defendant, in whose case said sum is payable, has actually begun to work out the sentence imposed upon him; and provided further that if the defendant in such case is not sentenced to the penitentiary, said sum shall be payable out of the general funds of the county upon presentation of a certificate by the sheriff of the county to the county treasurer to the effect that the defendant has begun to work out the sentence imposed upon him; and provided further that in each instance the certificate herein provided for shall be accompanied by a certificate from the presiding judge to the effect that the person claiming said sum is entitled to the same.

"Section 2. All sums now due and payable by virtue of the provisions of the prohibition laws of this State shall be paid in the way and manner herein provided for, and this Act shall take effect upon its approval by the Governor."

The obvious purpose of this latter Act, as specifically expressed by Section 2 thereof, was to provide for the manner in which the sum of $50.00 allowed by Act No. 7, General Acts of Alabama, 1919, page 6, should be paid to sheriffs, or other officers or persons furnishing evidence leading to a conviction for distilling or manufacturing of prohibited liquors or beverages.

The said Act No. 681, supra, was brought forward in substantially the same language in Title 29, Sections 257 and 258, Code of Alabama 1940.

Apparently the confusion which has arisen over the application of Title 29, Section 257 and 258, Code of Alabama 1940, is due to a failure to consider the fact that the Legislature sought to alter the provisions of said Act No. 7 to the extent that the sum involved should be paid from the convict fund, and in certain instances from the general fund of the county, rather than be taxed as other items of costs in the case. Any contrary construction would preclude any field of operation of said Act No. 681, and result in a finding that the Legislature had enacted a statute without meaning or purpose.

In the recent decision of our Supreme Court, **Moseley v. Kennedy,** 17 So. (2d) 536, dealing with this "so-called informer's fee," the following observation was made:

"We think it clear that the reward allowed by the aforesaid section is not a fee to be allowed a sheriff, because he is sheriff, although that is important in view of the nature of his duties, but rather is a reward to spur individual initiative and diligence, whether the individual acts in an official or private capacty."

The effect of this decision in designating this sum of $50.00 as a "reward" more clearly supports the above conclusions, in view of the statutory lan-

guage in Title 29, Section 257, Code of Alabama 1940, providing for the payment from the convict fund of "rewards" in certain prohibition cases.

Furthermore, the fact that this sum has been held not to be a fee but only a reward brings it without the scope of Title 45, Section 70, Code of Alabama 1940, limiting the costs which may be paid in any one case from the convict fund to $250.00.

The rulings of this office to the effect that Title 45, Section 69, Code of Alabama 1940, in providing for the items of costs which may be paid from the convict fund imposes a limitation upon those items of costs which may be so paid, are inapplicable for the reason that said Section 257 specifically provides for the payment of this reward from the convict fund.

Therefore, where a person is convicted of unlawfully distilling or manufacturing or making prohibited liquors and beverages, the sheriff or other officer or person furnishing evidence leading to such conviction is entitled to the sum of $50.00 which shall be paid from the convict fund. If such defendant is not sentenced to the penitentiary but is sentenced to hard labor for the county, said sum shall be payable out of the general fund of the county.

The opinion of this office to Hon. E. P. Russell, Director of the Department of Corrections and Institutions, under date of April 3, 1944, in which a contrary conclusion was reached, is hereby expressly withdrawn and overruled.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 26, 1944.

Hon. T. C. Almon,

Judge of Probate,

Morgan County,

Box 118,

Decatur, Alabama.

Drivers License—Public Safety—Statutes—Title 36, Sections 57, 59, 66, Code of 1940—Act No. 347, General Acts of 1927, page 348—Act No. 181, General Acts of 1939, page 300.

A person under the age of sixteen years may not operate a motor vehicle upon the public highways of Alabama even though accompanied by an adult person.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of July 7, 1944, is as follows:

"Section 57, Title 36 of the Code of 1940, recites among other things, 'No person, either the owner, chauffeur, or other authorized driver of any motor vehicle, shall operate any such vehicle upon the public highways of this state, who is under the age of sixteen years, unless accompanied by an adult person.'

"Section 59, Title 36, 1940 Code, recites among other things, 'Every person, except those hereinbelow exempted, before driving any motor vehicle upon a public highway in this state, shall procure a driver's license.'

"Section 66, Title 36, Code of 1940 recites among other things, 'A driver's license shall not be issued to the following persons: Any person less than sixteen years of age.'

"Every few days I am asked the question whether or not a child between twelve and sixteen years of age can legally drive an automobile if accompanied by an adult person.

"Will you please give me your official opinion as to whether or not a child under 16 years of age can operate an automobile with an adult person in the car with them who has not been issued a drivers license or temporary permit."

It is my opinion that a child under the age of sixteen years may not operate a motor vehicle upon the highways of this State, even though accompanied by an adult.

Title 36, Section 57, Code of Alabama 1940, which Section was quoted in your inquiry, prohibits any person under the age of sixteen years from operating any motor vehicle upon the public highways of this State, unless accompanied by an adult person. This statute was originally enacted by the Legislature in Section 199 of Act No. 347, General Acts of Alabama of 1927, page 348.

However, in 1939 the Legislature enacted a statute the provisions of which are directly in conflict with said Section 57. This statute, Act No. 181, General Acts of Alabama of 1939, page 300, is brought forward in the Code of Alabama of 1940 as Title 36, Chapter 2. Title 36, Section 59, Code of Alabama 1940, requires every person to procure a driver's license before driving any motor vehicle upon a public highway in this State with certain exceptions not here pertinent. Title 36, Section 66, Code of Alabama of 1940, provides, among other things, that a driver's license shall not be issued to any person less than sixteen years of age.

Inasmuch as said Section 57 and said Sections 59 and 66 are in irreconcilable conflict, said Sections 59 and 66, being a later expression of the Legisla-

ture on the same subject, necessarily repeal by implication the provisions of said Section 57.

Therefore, it is my opinion that a person under the age of sixteen years may not operate a motor vehicle upon the public highways of Alabama, even though accompanied by an adult person.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 26, 1944.

Hon. C. E. Sauls, Director,

Department of State Docks and Terminals,

Mobile County,

Mobile, Alabama.

Docks Commission—Travelling Expenses—Title 38, Sections 31 and 35, Title 41, Section 154, as amended, Code of 1940.

Title 41, Section 154, Code of 1940, as amended, does not limit the amount of travelling expenses allowable to employees of the Department of State Docks and Terminals.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

I am in receipt of a letter from Hon. T. E. Twitty, Attorney for the Department of State Docks and Terminals, written under date of June 29, 1944, in which an opinion is requested as to whether or not Title 41, Section 154, Code of 1940, as amended by Act No. 238, General Acts of Alabama 1943, page 195, which limits the amount of travelling expenses allowable to persons travelling in the service of the State, applies to employees of the Department of the State Docks and Terminals.

It is my opinion that your inquiry must be answered in the negative.

The Department of State Docks and Terminals operates under the provisions of Title 38, Chapter 1, Sections 1-45, Code of 1940. I wish to call your attention to Sections 31 and 35 of said Title, which Sections provide in part as follows:

"§ 31. Proceeds of improvements; how used.—The proceeds of the handling and operation of the improvements and facilities authorized shall be applied and used as follows: All expenses of carrying out the purposes of this chapter shall be paid from said proceeds. *** "

"§ 35. Authority of governor and department; how exercised and evidenced.—The governor and the department, respectively, are directed and required to exercise the power and authority by this chapter conferred upon them, respectively, to whatever extent is necessary to the accomplishment of the improvement and development hereby authorized. *** "

Section 31, supra, requires that the proceeds of the operation of the State Docks shall be applied and used for the purpose of carrying out the provisions of Title 38, Chapter 1, Code of 1940. Section 35, supra, requires you as Director of the Department of State Docks and Terminals, to exercise the power and authority conferred on you by Title 38, Chapter 1, Code of 1940, "to whatever extent is necessary to the accomplishment of the improvement and development hereby authorized."

It is my understanding that during the period that the State Docks has been in operation, the Department and its predecessor, the State Docks Commission, have construed the above quoted statutes to be sufficient authority for the payment of actual travelling expenses of the employees of the Department, and to bring the employees of the Department without the provisions of Title 41, Section 154, Code of 1940, as amended; and that such construction has met with the approval of all State administration with the possible exception of that of Governor Miller.

It is a well known canon of statutory construction that the administrative construction placed upon a statute, especially when it has gone unchallenged for a long period of time, should be given great weight in determining the legislative intent. This is more particularly true when such statutes are re-enacted by the Legislature which such construction is indulged in. **State v. Tuscaloosa, etc.,** 230 Ala. 476, 61 So. 530. **Kern River Co. v. U. S.,** 257 U. S. 147, 66 L. Ed. 175.

Inasmuch as said Sections 31 and 35, supra, have been construed for a long period as authorizing the payment of actual travelling expenses to the employees of the Department, and as the Legislature has re-enacted these statutes by the adoption of the Code of 1940, it is my opinion that this construction still obtains.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 27, 1944.

Hon. J. H. Sims,

Judge of Probate,

Bullock County,

Union Springs, Alabama.

County Service Commissioner—Counties—Courts of County Commissioners—Bonds—General Acts of 1943, page 587.

1. Under the provisions of General Acts of 1943, page 587, the County Service Commissioner must have a seal of office and execute a bond in the penal sum of $5,000.00.

2. County without authority to pay premium on notary bond for County Service Commissioner.

3. It is not necessary that a commission be issued to the County Service Commissioner.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of July 12, 1944, is as follows:

"Re; House Bill No. 586, County Service Commissioner.

"As I understand the two Sections 4 and 7 of the above Act, the County Service Commissioner shall have a seal of office. Under Section 7 of the Act the County Service Commissioner shall before entering upon the duties of his office execute a bond in the penal sum of $5,000.00, to be approved as bonds of other County officials. That this bond must be filed for record in the office of the Judge of Probate as the bonds of other County Officers, Title 41, Section 82.

"The Service Commissioner of this County has no seal of office; and there has been no bond filed as provided by the Act.

"Kindly advise me if it isn't necessary for the Service Commissioner to obtain his seal of office and that he execute the above mentioned bond in the sum of $5,000.00.

"There has been a claim filed in this office for payment of a bond premium in the sum of $5.00 for a Notary Public Commission for the Service Commissioner. I am of the opinion that it would be unnecessary for

the Service Commissioner to be appointed Notary Public if he secured the proper seal of office as set forth in the Act.

"Is this claim against the County for the bond premium of Notary Public for the Service Commissioner a legal claim against the County?

"Please also advise me who is the proper official to issue the Commission to the Service Commissioner. The Service Commissioner of this County was appointed by the Commissioners Court at a regular session and recommended by the Local American Legion Post."

In answering your inquiry, I wish to call your attention to the following provisions of Act No. 586, General Acts of Alabama 1943, page 587:

"Section 4. The County Service Commissioner shall have a seal of office, and shall be authorized to administer oaths to any person or persons who may desire to swear to the correctness of any statement or statements made in connection with any application for compensation, hospitalization, insurance or other aid or benefit to which such person or persons, or any other person or persons on whose behalf the affidavits are made, may be entitled under existing laws of the United States, or such as may hereafter be enacted; and he shall likewise be authorized and empowered to certify to the correctness of any document or documents which may be submitted in connection with any such application or applications."

"Section 7. The County Service Commissioner shall before entering upon the duties of his office, subscribe to and execute an oath of office and a bond in the penal sum of Five Thousand Dollars, with sufficient surety to be approved as the bond of other County officials, conditioned on the faithful performance of his official duties."

In answer to your first inquiry, it is my opinion that it is necessary for the County Service Commissioner to obtain a seal of office and execute a bond in the penal sum of $5,000.00. Section 4, supra, expressly provides that the County Service Commissioner shall have a seal of office. Section 7, supra, provides that the County Service Commissioner shall, before entering upon his duties, execute a bond in the penal sum of $5,000.00, said bond to be approved as the bond of other county officials and conditioned on the faithful performance of his duties.

In answer to your second inquiry, I wish to advise you that there is no provision of law which authorizes the county to pay the premium on a notary bond for the County Service Commissioner. It follows that a claim for such premium is not a legal claim against the county. Furthermore, under the provisions of Section 4, supra, the County Service Commissioner is authorized to administer oaths to any person or persons who may desire to swear to the correctness of any statement made in connection with applications for compensation, hospitalization, insurance and other benefits. This provision eliminates the necessity of the County Service Commissioner being a notary.

In answer to your third inquiry, I wish to advise you that it is not necessary that a commission be issued to the County Service Commissioner. There is nothing in said Act No. 586 which requires that such a commission

be issued. Under the provisions of Section 2 of said Act No. 586, the governing body of the county is authorized to appoint a County Service Commissioner whose name shall be selected and submitted to in accordance with the provisions of said Section. The resolution of the county governing body appointing the County Service Commissioner, which resolution should appear in the minutes of said governing body, is sufficient authority from said governing body for the Commissioner to enter upon his duties .

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

July 27, 1944.

Hon. Marshall C. Hester,

Register Circuit Court, and

Ex-off. Register Law & Equity Court,

Franklin County,

Russellville, Alabama.

Inferior Courts—Preliminary Hearings—Costs and Fees—Clerks—Franklin County—Act No. 404, Local Acts of Alabama of 1923, page 272—Title 15, Sections 135 and 136, Code of 1940.

The clerk of the circuit court, when acting as ex officio clerk of the Law and Equity Court of Franklin County, being subject to the same provisions applicable to circuit clerks under the general law, is under no duty to render services in preliminary hearings held before the judge of said court acting as committing magistrate, and there is no provision of law by which he is entitled to any fees therefor.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of July 14, 1944, is as follows:

"Under date of May 19, 1944 you rendered an opinion to Hon B. G. Farmer, Sheriff of Houston County, Dothan, Alabama, in which you held that a sheriff is entitled to his fees in a preliminary hearing when the defendant is bound over to the Grand July and is indicted, and if convicted the same to be paid by the convict department and if acquitted or nol

prossed the same is a lawful charge against the fine and forfeiture fund of the county. You cited the case of **Hawkins, ex rel. O'Brien, 124 Ala. 102.**

"I am now Register of the Circuit Court of Franklin County, and Ex-Off. Register of the Law & Equity Court of this county, but I am also Ex. Clerk of the Circuit Court of this county and Ex. Clerk of the Law & Equity Court of this county. In the said opinion of Sheriff Farmer you ruled that under certain conditions the Clerk of the County Court would be entitled to collect from the fine and forfeiture fund $2.00 for his services in preliminary hearings.

"I want to know if I as the Ex Clerk of the Law & Equity Court and Hon. C. E. McNatt as the present Clerk of the Law & Equity Court are entitled to go back and collect from the fine and forfeiture fund our regular fees on preliminary hearings on those cases which were bound over to the Grand Jury and indicted. Of course we understand that the same proper proceedure as to the return of executions 'No property found' or the cases acquited or nol prossed would have to be followed just as you have ruled as to sheriff's fees would have to prevail. Our authority for contending that we are entitled to our regular clerk's fees is based on the **Local Acts of 1923, Page 272.** Under Section 4 of this local act you will find that the Clerk of the Circuit Court is made Ex-Off. Clerk of the Law & Equity Court and shall receive the same fees as the Clerk of the Circuit Court which shall be collected in the same manner as in Circuit Court, etc. This local act certainly makes it the duty of the Clerk of the Law & Equity Court to keep all the records for the Judge of said Court, just as the records of the Circuit Court are kept. When I was Clerk of the Law & Equity Court I did keep them, and the present Clerk keeps them, in all respects as the records in Circuit Court are kept. I shall thank you to advise me if we are entitled to collect the fees in preliminaries just as the Sheriff would be. Our further authority is based on your opinion to Sheriff Farmer where you say that the sheriff is serving in preliminaries he is not acting as constable but is acting in his capacity as Sheriff and is entitled to full sheriff's fees. We contend as Clerk of the Law & Equity Court we do not come under the law allowing the Clerk of the County Court $2.00 for this service, nor neither do we come under the laws of committing magistrate as provided under Title 11, Section 84, of the Code of Alabama 1940, but we come under the Local Acts of 1923 creating the Law & Equity Court of Franklin County, in which we are entitled to the same fees as the Clerk of the Circuit Court."

It is my opinion that the clerk of the circuit court and ex officio clerk of the Law and Equity Court of Franklin County is not entitled to any fees in preliminary hearings.

The Law and Equity Court of Franklin County was created by Act No. 404, Local Acts of Alabama of 1923, page 272, Section 4 of which provides that the clerk of said court should be entitled to the same fees allowed clerks of circuit courts by the general law. Said local Act contains no authority for the judge of said court to act as a committing magistrate; rather, his authority to act as a committing magistrate is derived from the general law granting such power to the judges of inferior courts. Quarterly Report of the Attorney General, Volume 10, page 10.

There is no provision of law imposing any duty upon the circuit clerk to attend or perform any service in connection with preliminary hearings. Title

15, Sections 135 and 136, Code of Alabama 1940, impose the duty upon the committing magistrate to conduct the preliminary hearings, reduce to writing and preserve the testimony, and deliver same to the clerk of the court having jurisdiction of the cause.

Inasmuch as the circuit clerk, when acting as ex officio clerk of the Law and Equity Court of Franklin County, is subject to the same provisions applicable to circuit clerks under the general law, there is no duty imposed upon him to render services in connection with preliminary hearings held before the judge acting as committing magistrate, and there is no provision of law by which he is entitled to any fees therefor.

The opinion of this office to Hon. B. G. Farmer, Sheriff of Houston County, under date of May 19, 1944, referred to in your inquiry, is inapplicable, for the reason that, unlike circuit clerks, the law imposes upon the sheriff certain duties he must perform in connection with preliminary hearings.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 1, 1944.

Hon. W. O. Dobbins, Jr., Director,

State Planning Board,

711 High Street,

Montgomery 5, Alabama.

Code 1940, Tit. 37, §§ 787, 791, 797, 798—Municipal Corporations—Planning Commissions—Zoning Powers—

1. A city or town is not authorized directly by ordinance to exercise zoning powers outside its corporate limits.

2. A city or town with a planning commission may, through such commission, exercise zoning powers outside its corporate limits within the 5-mile jurisdiction of the commission granted to it by Code 1940, Tit. 37, §§ 797-798.

3. The planning commission itself in such case exercises zoning powers outside the corporate limits by including in its "master plan" areas outside the corporate limits, and "a zoning plan for the control of the height, area, bulk, location, and use of buildings and premises" as provided by Section 791, and by control and regulation of subdi-

vision of land as authorized by Section 797 and 798 so as to harmonize development of subdivisions with the "master plan" for development of the corporate area itself.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of July 25, 1944, is as follows:

"Section 373 (5), Title 55, Code of Alabama 1940, provides that: The Board shall advise and cooperate with municipal, county, regional and other local planning boards within the state for the purpose of promoting coordination between the state and local plans and development.

"In line with the above, the State Planning Board has entered into cooperative planning programs with a number of Alabama municipal and regional planning commissions. The question has arisen in our work with these municipal planning commissions whether zoning can be extended outside of the municipal corporate limits. The Jefferson County Regional Planning Commission has specifically asked us this question. The answer to this question will have a definite bearing on the type and method of studies undertaken by the Jefferson County Regional Planning Commission.

"Therefore, this is our request for a formal opinion on the following: Can any municipality having a planning commission adopt a zoning ordinance to apply to all or a part of the area outside of the corporate limits but within the area of planning commission territorial jurisdiction over the subdivision of land?"

The exercise of the zoning power by a city or town is confined to its territorial area and does not extend beyond the corporate limits unless such city or town sees fit to create a planning commission as authorized by Code of 1940, Title 37, Section 787. Title 37, §§ 772, 780.

Under the creation of such a planning commission, it succeeds to whatever authority a zoning commission may have exercised. Title 37, Section 796.

The planning commission's jurisdiction is declared to include not only land within the city or town but also "all land lying within five miles of the corporate limits of the municipality and not located in any other municipality, except that, in the case of any such non-municipal land lying within five miles of more than one municiaplity having a planning commission, the jurisdiction of each such municipal planning commission shall terminate at a boundary line equidistant from the respective corporate limits of such municipalities." Such jurisdiction relates to the subdivision of lands and in Section 798 the commission is authorized to regulate and control the subdivision of lands within its jurisdiction by prescribing the proper arrangement of streets as related to other streets and to the "master plan." Such regulations embrace provision for traffic, utilities, access of firefighting apparatus, recrea-

tion, light and air, avoidance of congestion of population, installation of utilities and various other details deemed necessary for the public welfare and future development of the city or town.

It is further provided in said section that such regulations shall be published as provided by law for the publication of ordinances, and before adoption, a public hearing shall be held thereon, and also that a copy of the regulations shall be certified by the commission to the probate judge of the county wherein the city or town and the adjoining territory is located.

The "master plan" referred to in Section 798 is required to be made and adopted by the commission "for the physical development of the municipality, including any areas outside of its boundaries which, in the commission's judgment, bear relation to the planning of such municipality." And, among other things, the "master plan" is required to embrace "a zoning plan for the control of the height, area, bulk, location, and use of buildings and premises." As the "master plan" progresses, the commission may, from time to time, adopt and publish parts thereof covering "one or more major sections or divisions of the municipality or one or more of the aforesaid or other functional matters to be included in the plan." Title 37, Section 791.

It is not altogether clear what is meant by the words, "other functional matters," but from the reading of Section 791 in its entirety it would seem to be reasonably clear that these parts of the "master plan" so authorized to be adopted and published necessarily include not only "sections or divisions of the municipality" but also parts of "areas outside of its boundaries which, in the commission's judgment, bear relation to the planning of such municipality."

This would seem to be a reasonable construction or interpretation of the somewhat ambiguous language in which the various scattered provisions of the planning commission statute are expressed. Evidently, by the statutory authority granted it to control and regulate the subdivision of land beyond the corporate limits, as provided in Sections 797 and 798, and to harmonize the same with division of the corporate areas into zones wherein the control of the height, area, location and use of buildings and premises is exercised by the commission, the Legislature intended to extend the zoning power beyond the corporate limits, as set out in section 797.

For answer, therefore to your question, whether a municipality, having a planning commission, may "adopt a zoning ordinance to apply to all or a part of the area outside of the corporate limits but within the area of planning commission territorial jurisdiction over subdivision of land," I am of opinion that the municipality must exercise such powers through the planning commission itself and in the manner provided by the statutes above cited and referred to. In other words, a city or town may not directly by ordinance undertake to divide territory outside its corporate limits into zones or residential, commercial and industrial districts, without intervention of the planning com-

mission. It is for the planning commission itself to do whatever zoning may be necessary outside the corporate limits through the medium of its "master plan" and regulation of the subdivision of lands.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 4, 1944.

Hon. H. G. Dowling,

Commissioner of Revenue,

Montgomery, Alabama.

1. Sales Tax—Sheriff should not collect any costs on behalf of the clerk of the circuit court upon a writ of execution issued by State Department of Revenue under Title 51, Section 770, Code of Alabama 1940.

2. Sheriffs—Sheriff should not collect any costs on behalf of the clerk if the circuit court upon a writ of execution issued by State Department of Revenue under Title 51, Section 770, Code of Alabama 1940.

3. Sales Tax—Clerk of circuit court receives fifteen cents per hundred words for enrolling writs of execution issued by Department of Revenue (Title 51, Sections 770, 784) and his compensation is at the rate of fifteen cents per hundred words. Title 11, Section 21, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of July 6, 1944, is as follows:

"Section 770, Title 51, Code of Alabama 1940, provides in part as follows:

" 'The sheriff shall within five days after the receipt thereof (meaning writs of execution) file with the clerk of the circuit court of his county a copy thereof, and thereupon the circuit clerk shall enter in the judgment roll, in the column of judgment debtors, the name of the taxpayer named in the execution, the amount of the tax, and dam-

ages and penalties for which the execution is issued, and the day when such copy is filed. *** The officer shall be entitled to the same fees for his services as now allowed by law for like services to be collected in the same manner as now provided by law for like services.'

"The State Department of Revenue will appreciate it if you will give it an official opinion on the following questions, suggested by the quoted provision of the Chapter:

"1. Does the word 'officer' include the clerk of the circuit court?

"2. Should the clerk of the circuit court receive the same compensation for enrolling writs of execution by the State Department of Revenue as he receives for enrolling a judgment issued by the Circuit Court?

"3. Is it the duty of the Sheriff to collect any costs on behalf of the clerk of the circuit court upon any writ of execution issued by the State Department of Revenue?"

Your inquiries refer to Title 51, Section 770, Code of Alabama 1940, which provides as follows:

"§770. Execution, levy and sale for taxes.—If any final assessment of taxes herein levied be not paid within thirty days after such assessment becomes final if no appeal has been taken, in cases where an appeal is authorized, the department shall issue an execution therefor directed to any sheriff of the State of Alabama commanding him to levy upon and sell the real and personal property of the person against whom such execution is directed, found in his county, together with all penalties assessed. The sheriff shall within five days after the receipt thereof file with the clerk of the circuit court of his county a copy thereof, and thereupon the circuit clerk shall enter in the judgment roll, in the column of judgment debtors, the name of the taxpayer named in the execution, the amount of the tax, and damages and penalties for which the execution is issued, and the day when such copy is filed; thereupon the amount of such execution so docketed shall become a lien upon the real and personal property of the person against whom it is issued in the same manner as judgments duly enrolled from the circuit court or court of like jurisdiction.

The sheriff thereupon shall levy upon any property of the taxpayer with like effect and in the manner prescribed by law in respect to execution issued upon judgments of the circuit court or court of like jurisdiction, and the remedies of attachment and garnishment shall apply fully to such execution, and the officer shall be entitled to the same fees for his services as now allowed by law for like services to be collected in the same manner as now provided by law for like services. The sheriff shall make due return of such execution within sixty days of the issuance thereof to the department and upon such return alias or pluries executions may be issued by the department which shall be executed in the same manner. Such lien shall not be valid against any mortgagee, purchaser, or judgment creditor until notice has been filed in the office of the judge of probate as provided for under section 883 of this title."

I think it advisable to answer your request in inverse order.

(3) In answer to your third inquiry it is my opinion that the sheriff should not collect any costs on behalf of the clerk of the circuit court upon a writ of execution issued by the State Department of Revenue for the reason that the clerk of the circuit court obtains his fee for "enrolling" or entering "in the judgment roll, in the column of judgment debtors, the name of the taxpayer named in the execution, the amount of the tax, and damages and penalties for which the execution is issued, and the day when such copy is filed; *** " directly from the State Department of Revenue under the provisions of Title 51, Section 784, Code of 1940, providing that "any and all expenses, including salaries, necessary to provide for the administration and enforcement of this article shall be paid out of the proceeds of the collection therefrom before any distribution or disbursement." 20 Quarterly Reports of the Attorney General, page 45. In the opinion last cited it was held that the costs or fees that should be paid to the clerk could not be collected from the taxpayer for the reason that there was no judgment for costs. See also 18 Quarterly Reports of the Attorney General, page 22, holding that execution issued by the Department of Revenue should be recorded on the minutes of the court and that the clerk should receive for the recording of such executions fifteen cents per hundred words.

(2) In answer to your second inquiry you are advised that the fee that the clerk should receive for enrolling a writ of execution issued by the State Department of Revenue is the same as that prescribed by Title 11, Section 21 —fifteen cents per hundred words. 18 Quarterly Reports of Attorney General, page 22.

(1) It is unnecessary to decide whether the word "officer" as used in the above quoted Code section includes the clerk of the circuit court because this office has heretofore decided that the clerk is entitled to his fee for enrolling the copy of the execution issued by the Department of Revenue. 18 Quarterly Reports of Attorney General, page 22.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 10, 1944.

Hon. Frank O. Deese,

Judge of Probate,

Dale County,

Ozark, Alabama.

Residence—Adoptions—Children—Public Welfare—Title 27, Section 1, Code of 1940.

The establishment of legal residence in the State of Alabama requires that a person's presence here be accompanied by his intention to make this State his permanent home. The length of time he has been in this State is not the controlling factor in establishing residence.
Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of July 26, 1944, is as follows:

"Due to the location of Camp Rucker in this County, we are having quite a lot of trouble about adoptions of children by people who are really not bona fide citizens of this county, but who are here only temporarily. They come for a short time only and wish to adopt children in this County while they are here and shortly will be transferred to another camp and will leave Dale County for good.

"I am asking your opinion as to what length of time should be considered sufficient to establish bona fide residence for purposes of such adoptions."

In answer to your inquiry, you are advised that no definite length of time is necessary for the establishment of legal residence.

It is well established principle of law that the legal residence of a person is a mixed question of law and fact, dependent upon the intention and acts of such person. The establishment of legal residence requires that a person's presence in a place be accompanied by his intention to make such place his permanent home. If a person moves to Alabama with the intention of making Alabama his permanent residence, and by so doing abandons his former residence, he becomes a resident of Alabama regardless of the period of time that he has been in the State.

It appears from your request that you assume that it is necessary for a person to establish his legal residence in Alabama before adopting a child. However, I wish to call your attention to Title 27, Section 1, Code of Alabama 1940, vesting in the probate court jurisdiction over adoption cases, which Section permits the filing of adoption proceedings in either of the following in-

stances: (1) Where the person or persons seeking to adopt a child are legal residents of the county, or (2) where the child sought to be adopted is a legal resident of the county, or (3) where the child was a legal resident of the county at the time it became a public charge, or (4) the agency or institution, operating under the laws of this state, having guardianship and custody of the child is located in the county.

It can be seen, therefore, that it is not necessary for the persons seeking to adopt a child to be residents of the county. It is only necessary that one of the above residence requirements be met.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 11. 1944.

Hon. B. G. Robison,

Judge of Probate,

Pickens County,

Carrollton, Alabama.

LOCAL ACT APPROPRIATING MONEY BY COUNTY FOR RELIEF OF INDIVIDUALS

1. The Local Act of the Legislature of 1943 for Pickens County authorizing relief to the widow and minor children of a county employee is valid under the Constitution of 1901, Section 94.

2. Failure of such Act to provide for an appropriation does not affect its validity.

3. It creates an obligation against the county which must be listed in a county's annual budget.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of July 10, 1944, is as follows:

"House Bill 775, Local Acts of Alabama, 1943, page 178, purports to authorize the Court of County Commissioners of Pickens County to pay to the widow of Woodrow Comer Hall and his two sons the sum of $500.00 each. Woodrow Comer Hall was a truck driver in the employ of Pickens County in road maintenance and construction and was killed in an auto accident.

"The said act fails to specify from what fund the appropriation is to be made.

"1. I shall be glad to have you advise me at your earliest convenience if the Court of County Commissioners can legally pay the said appropriation.

"2. If the Court can legally make said appropriation, please advise from what fund it should be made."

Assuming that Section 106 of the Constitution has been complied with by the publication of notice of the intention to introduce this bill once a week for four consecutive weeks in some newspaper published in your county and that proof by affidavit that said notice has been given was exhibited to each house of the Legislature, and proof spread upon the journals, we will proceed to answer your request. We make these presumptions because the House and Senate Journals of the proceedings of the Legislature of 1943, have never been published and are not accessible to us.

It has long been the settled law of this State that the Legislature is the representative of the people who are the sovereign, and that it may make any legislation it sees fit, wise or foolish, just or unjust, except where restrained by the powers delegated to the United States Government by the people of the State or by the Constitution of the State, which is the creature of the people. **Dorman v. State,** 34 Ala. 216.

The Local Act inquired about in your letter is in no wise forbidden by the federal Constitution. In my opinion Section 94 of the Constitution of Alabama may be applicable to such legislation. This Section of the Constitution provides that the Legislature shall not have power to authorize any county, city, town or other subdivision of the State to grant public money or things of value by a county in aid of or to any individual, etc. Our courts have given this provision a very liberal construction. They hold that the Legislature may, without violating this section, make or authorize to be made appropriations of public moneys for a public purpose, such as an appropriation to pay a just claim against the state or county authorities. Such claim need not be legally enforcible. It must be a moral claim, based on equity and justice. **Board of Revenue and Road Commissioners of Mobile County v. Puckett,** 227 Ala. 374; **State ex rel Dorlan v. State,** 6 So. 2d. 898.

In the Puckett case, which is similar to this case, the court said the Legislature has to a great extent a right to determine the question as to its being such a claim as is discussed above, and that its determination is conclusive except when it does not clearly appear to be wrong. It is not very apparent just what is meant by the expression "when it does not clearly appear to be wrong," nor is it made to appear just how this is to be ascer-

tained, but it is clear that the determination of the legislature is not aboslutely conclusive so as to foreclose any efforts to show that its conclusions are clearly wrong. The thing or facts to be determined by the Legislature is that the claim authorized to be paid by it is a righteous, just and moral claim.

It would appear that there must be a determination by the Legislature and after facts determined by it are expressed in the legislative enactment then they would probably foreclose any further inquiry unless the facts there recited show that the claim is unjust. The primary rule in construing an Act is to ascertain and give effect to the legislature's intention and to do this we are not confined to the literal meaning of the words used, but may look to the other provisions and consider its relation to constitutional provisions on the subject; view its history and purposes and the purpose sought to be accomplished. **Abramson v. Hard,** 229 Ala. 2.

With these general principles in mind, we will examine the Act under review.

The Act has what is termed a preamble, which is subjoined to the title of the Act. It reads as follows:

> "Whereas Woodrow Comer Hall was on or about the eighth day of June, 1943, while in the employ of Pickens County, Alabama, operating a truck in said employment, received injuries from which he died soon thereafter, and said decedent left surviving him a widow, Mrs. Jewel Hall and two minor sons, James Clifton Hall and W. C. Hall, as his heirs at law, therefore:"

Preambles to legislative enactments anciently were common, but in modern legislative enactments have grown somewhat obsolete. However, in the present Act, under the rules of the court dealing with legislation involving a construction of Section 94 of our Constitution, a preamble is very proper and useful.

Our Supreme Court has considered the effect of a preamble on a legislative enactment. It has said: (**White v. Levy,** 8 So. 563, 564)

> "The preamble to the act is in the following language: 'Whereas, it is desirable to afford suitors speedy remedy for the recovery in said court of ordinary debts, and the like, the civil jurisdiction of said court should be remedied: Therefore, be it enacted,' etc. The preamble to an act neither confers nor restricts powers, rights, privileges, or duties, and, strictly speaking, is no part of the act itself. If the enacting clause is clear and positive, the preamble is without scope; but if the enacting clause is not plain, if its intent cannot be clearly understood, then, in the language of Lord Coke and Lord Bacon, 'the preamble is the key to open the understanding of the statute.' Sedg. St. & Const. Law, (2d Ed.) 43; 1 Kent Comm. 460; Bartlett v. Morris, 9 Port. (Ala.) 270. The true powers of a preamble are to expound powers conferred, and not to create them. It has a foundation in the exposition of every written law, upon the universal principles of interpretation, that the will and intention of the legislature is to be regarded and followed."

This announcement of our Court is in harmony with the general law on the subject. Volume 50, **Am. Juris, (Statutes)**, Section 152, says: "A preamble to a statute is an introductory or prefatory clause, following the title and preceding the enacting clause, explanatory of the reasons for its enactment and the objects sought to be accomplished."

Viewing the preamble of the Act now under consideration in the light of the above authorities it becomes obvious that the legislature in the preamble set out a state of facts from which it determined that the relief sought to be conferred by the Act was a moral claim based on equity and justice. Under our decisions, supra, this determination by the legislature is conclusive upon everyone except when it does not clearly appear to be wrong.

There is nothing in the Act authorizing a conclusion that the relief granted is wrong. Some of the questions here under review were considered by this office in Volume 32, Quarterly Report Attorney General, page 140. Our conclusion is that the Act is valid.

The Act fails to make an appropriation for the payment of the claim, however, it is under the law a valid obligation against the county,—one created by law. 14 **Am. Juris. (Counties)** Section 65.

Code, Title 12, Section 12, Subdivisions 3 and 4, require the county governing body to levy a general tax to raise money for the county for county obligations and purposes.

And it also authorizes them to settle and allow all claims against the county. However, it appears that the Financial Control Act, incorporated in the Code of 1940, Title 12, Section 72 et sequi, may affect the time and manner of payment of the claim under this Local Act.

Section 73 gives the governing body "more effective power and control over all public funds of the county."

Section 74 requires the governing body to prepare and adopt annually an estimate of all incomes of the county for the fiscal year and to estimate for the same year the expenses of operation and make appropriations for the respective amounts.

It is true that it appears that these provisions are dealing with annual expenditures for the operating of the business of the county, but an estimate of the annual income is also required. It appears that if the county has no more money on hand than is necessary to cover the actual expenses of the county for the present fiscal year the beneficiaries under this Local Act cannot be paid until the beginning of another fiscal year. However, it is the duty of the governing body, at its meeting in September 1944, to list this obligation as one of its liabilities and pay the same out of funds of that fiscal year.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 12, 1944.

Hon. D. M. Weakley, Superintendent,

Boys Industrial School,

Jefferson County,

Birmingham, 6, Alabama.

Alabama Boys Industrial School—State—Taxation—Exemptions.

The Alabama Boys Industrial School, being an agency of the State of Alabama, is not subject to tax levied by the City of Birmingham, in the absence of an express legislative intent in the statute authorizing the City of Birmingham to levy the tax that the Boys Industrial School is subject thereto.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

Your request for an official opinion, bearing date of August 7, 1944, is as follows:

"Recently we purchased a quantity of tractor fuel from Sinclair Refinding Company. In billing this fuel to us One Dollar and Twenty Cents ($1.20) was included as 'P.J.' (Police Jurisdiction) tax, which is levied by the City of Birmingham.

"On the assumption that as a State Institution we are not subject to local taxation, and upon the advice of Mr. Fraser of the State Examining Department, we have withheld payment of this tax pending an authoritative opinion as to its legality. We will appreciate such an opinion from you."

It is my opinion that the Alabama Boys Industrial School is not liable for the tax levied by the City of Birmingham upon tractor fuel.

The Alabama Boys Industrial School was created by, and is an agency of, the State of Alabama, and possesses the same exemptions and privileges of the State of Alabama. **Alabama Boys Industrial School v. Addler,** 144 Ala. 555, 42 So. 116.

In the case of **City of Huntsville v. Madison County,** 66 Ala. 389, 52 So. 326 the Supreme Court of Alabama held that a tax levied by a municipality under its general statutory authority was not sufficient to embrace the property of the State or county; and that property owned and held by the State or county for public purposes is generally exempted from taxation of any description, unless an Act of the Legislature authorizing the municipality to levy the

tax in question expressly provides otherwise. This case held further that inasmuch as Section 14 of the Constitution of Alabama of 1901 prohibited the State from being made a party defendant in any suit at law or equity, there existed no means by which any tax against the State could be collected.

In opinions of this office to the Probate Judge of Henry County, under date of October 12, 1928, Biennial Report, 1928-1930, page 44, and to the Adjutant General of the State of Alabama, under date of January 4, 1929, Biennial Report, 1928-1930, page 108, it was held that a municipality had no authority to levy a tax upon the State or instrumentality thereof.

Therefore, inasmuch as the Alabama Boys Industrial School is an agency of the State of Alabama, it is my opinion that it is not subject to a tax levied by the City of Birmingham, in the absence of express legislative intent in the statute authorizing the city of Birmingham to levy the tax, that the Alabama Boys Industrial School is subject thereto.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 14, 1944.

Hon. H. G. Dowling,

Commissioner of Revenue,

Department of Revenue,

Legal Division,

Montgomery 2, Alabama.

Code 1940, Tit. 51, § 94—Boards of Equalization—Compensation—Compensation to members of a County Board of Equalization is determined according to the total assessed valuation of taxable property in the county as shown on the tax assessor's abstract of assessments for the year 1938, including all assessments for 1938 and escape assessments for prior years.

Claims against the State for balances of unpaid compensation for prior years should be presented by petition to the Board of Adjustment; and claims against the county therefor should be presented to the county governing body.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of July 22, 1944, is as follows:

"I have recently received from the Board of Equalization of Montgomery County letter bearing date of July 10, 1944—a copy of which I am attaching as a statement of the facts—which raises the following issues on which I shall thank you to give me your official opinion:

"1. Can I legally include the assessed value of the escaped properties assessed by the Tax Assessor of Montgomery County for the tax year 1933 in arriving at 'the total assessed value of all taxable property * * *' according to the Tax Assessor's abstract of assessment for the year 1938, for the purpose of determining the bracket in which the county falls in arriving at the compensation to be paid the members of the Board of Equalization of said county? You, of course, understand that the Tax Assessor is required, under Section 53 of Title 51, Code of 1940, to assess any property which has escaped taxation within five years next preceding the current year. Therefore, to state the question a bit differently, and assuming that the Tax Assessor assessed during the tax year of 1938 escapes of the assessed valuation of $500,000 for the year 1937, $500,000 for the year 1936, $500,000 for the year 1935, $500,000 for the year 1934, and $500,000 for the year 1933—or a total of $2,500,000, which assessments are reflected by the Tax Assessor's abstract of assessments for the year 1938, can I legally include this $2,500,000 in arriving at the total assessed value of all the taxable property of Montgomery County, under Section 94, Title 51, Code of 1940, in determining the bracket in which Montgomery County falls for the purpose of ascertaining the salary to be paid to the members of the said Board of Equalization.

"2. In the event your answer to the foregoing question is in the affirmative, please advise whether or not I could legally pay the members of said Board the difference which might be due to the members thereof, resulting from the county falling in a higher bracket from that where it has heretofore been placed; or, would their claims for either of the years back to and including 1939 be barred by the Statute of Limitations as to (a) State, and (b) county—and if barred for either of said years, which year/years?

"3. Where the Tax Assessor of Montgomery County assesses escapes during the tax years of 1939, 1940, 1941, 1942, 1943, and 1944, covering assessments of the tax year 1938, can the value of said assessments for the tax year 1938 be included in 'the total assessed value of all taxable property,' for which the county falls in arriving at the compensation to be paid the members of the Board of Equalization? (See Section 94, Title 51, Code of 1940)

"Thanking you to advise me in the premises at your earliest convenience."

In connection with your request, I have also considered a letter from members of the Board of Equalization, to yourself dated July 10, 1944, and

a similar request from the Montgomery County Board of Revenue, from which it appears that the tax assessor's abstract for Montgomery County for the year 1938 showed a total valuation of assessable property amounting to $50,800,977, of which $1,466,176 represented assessments of escaped property. It further appears that through some error of oversight the members of the Montgomery County Board of Equalization understood that their salaries would be $800 each, annually, and that up to the present time they have been compensated at that rate.

The valuations of property assessed as escapes were for the years 1934 to 1938, inclusive.

Code 1940, Title 51, Section 53 requires the tax assessor to assess property escaping taxation in prior years upon discovery of that fact and Section 64 of said Title requires that upon completion of the book of assessments, the assessor shall make "a complete abstract of all real and personal property as contained in the assessment books of his county showing the total amount and value of each class of taxable property * * *."

Code 1940, Title 51, Section 94 provides in part that in counties with a total assessed value of taxable property exceeding $50,000,000 but not exceeding $100,000,000, "according to the tax assessor's abstract for the year 1938," members of the county board of equalization shall be paid at the rate of $1,000 each per annum, payable in four monthly installments.

It will be noted that compensation of the members of such boards in all counties, as stated in Section 94, is based upon, or measured by, the total assessed value of all taxable property "according to the tax assessor's abstract of assessments for the year 1938," and that there is no limitation, restriction or definition with reference to such values so shown.

Inasmuch, therefore, as assessment of property that has escaped taxation in prior years is properly shown on the tax assessor's abstract, required to be prepared under Section 64, I am of opinion that the legal compensation for members of the Montgomery County Board of Equalization was and continues to be $1,000 each annually instead of $800,—assuming, of course, that the abstract for 1938 showed values exceeding $50,000,000.

Code 1940, Title 51, Section 95 provides that "the compensation of the members of the several boards of equalization * * * shall be paid one-third by the state, one-third by the county, and one-third by any municipality in the county in which the total assessed value is equal to or greater than fifty percent of the total assessed value of all taxable property located in the county." I am advised that Montgomery County comes within this classification, so that one-third of such compensation is payable by the City of Montgomery and one-third by the State of Alabama.

I am of the opinion that whatever claims the members of the Montgomery County Board may make against the State should be presented by petition to the Board of Adjustment for the balance of compensation claimed by them, pursuant to Code 1940, Title 55, Section 334. I find no statute of limitation applicable to the payment of such a claim.

Their claims against the County should, of course, be presented to the county governing body, and inasmuch as the amount of the claim is fixed by law, (assuming that the county had taxable property assessed for taxation of the valuation of more than $50,000,000, according to the assessor's abstract of 1938,) such claims would not come within the operation of the Statute of non-claim. (Section 118, Title 12, Code 1940.) **Quarterly Report, Attorney General, Vol. 14, p. 123.**

Likewise, claims against the City of Montgomery for unpaid compensation should be presented to the governing body of the city.

This opinion is to be taken and considered as an answer also to request made for an official opinion by the Montgomery County Board of Revenue, dated July 25, 1944.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 14, 1944.

Hon. S. P. Poyner,

Judge of Probate,

Houston County,

Dothan, Alabama.

Code 1940, Title 21, §§ 98-102—Persons of unsound mind—Probate Judges—

1. A person of unsound mind within the purview of Code 1940, Tit. 21, §§ 98-102 is a person adjudged to be of unsound mind as provided in Code 1940, Tit. 21, §§ 9-14.

2. Judge of Probate without authority to act under Title 21, §§ 98-102 with respect to a person of unsound mind unless such person has been legally adjudged to be of unsound mind.

3. All the provisions of Title 21, § 101 apply to persons of unsound mind as well as to minors.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of July 27, 1944, is as follows:

"Please refer to Sec. 99 Tit. 21, Code of 1940 et. seq. and advise me as follows: What constitutes a person of unsound mind? Does such person necessarily have to be an adjudicated non compos mentis, or does it rest within the discretion of the Probate Judge as to having sufficient evidence of such mental incompetence?

"Under Sec. 101 of Tit. 21 authority is given the Judge to pay money to the father or mother of a minor without reference to a person of unsound mind. Please advise me if, under the case of Broadus vs. Johnson, 235 Ala. 314, this same authority applies to persons of unsound mind.

"If said person of unsound mind has no parent can the Judge, under authority of this Section and the decision above noted, on the proper Petition and Order disburse said funds to a custodian of such person of unsound mind.

"A lawsuit has been brought and a settlement is about to be made in which lawsuit the Plaintiff acknowledged to be of unsound mind and is brought in the name of a 'next friend'. Proof will be made in obtaining a Judgment that such person is of unsound mind. The money so recovered is to be turned over to me under the above Section. The person of unsound mind has no Guardian and it would entail quite a lot of expense in holding an inquisition and having a Guardian appointed."

Your question in effect is whether the judge of probate is authorized to act under Code 1940, Title 21, Sections 98-102, as amended (General Acts 1943, page 337) with reference to persons of unsound mind unless such persons have been duly and legally adjudged to be of unsound mind.

With reference to this statute as it appeared in the Code of 1907, it was observed in **Roberts vs. Hunt,** 212 Ala. 475, 103 So. 451, that it "declares the judge of probate shall not act as guardian, but by virtue of his office he is made a **quasi** guardian of these funds to a limited amount. One purpose is to avoid the expense of a general guardianship over small estates of this kind."

Code 1940, Title 21, Section 10 expressly forbids appointment of a guardian for a person of unsound mind without the execution of a writ of lunacy and due adjudication of insanity. There must be a hearing before the judge of probate, of which notice is given to the alleged incompetent by the sheriff arresting him and taking him into custody, a jury must be impaneled and sworn to try the issue, a guardian ad litem must be appointed to represent the alleged incompetent, if not represented by counsel, witnesses must be produced and examined, and the jury renders its verdict, whereupon the court enters a decree. In other words, the proceeding has all the elements and earmarks of a judicial trial. Any appointment of a guardian thereunder

without strict compliance with the statutory requirements is void. **Fowler cs. Nash,** 225 Ala. 613, 144 So. 831. **Montgomery vs. Montgomery,** 236 Ala. 33, 35, 180 So. 709. Code 1940, Title 21, Sections 9-14.

Appointment of a guardian without notice to the alleged incompetent and without taking him into custody in fact has been held not to constitute due process of law. In **Fowler vs. Nash,** supra, on page 616, it was held:

> "The wise policy of the statute requiring that the sheriff take the person of the alleged lunatic in his custody is to bring the alleged lunatic notice by restraining him of his liberty, so that if he has any mind at all he will realize that he must defend in order to remove this restraint, and so, if not, persons interested in his freedom and his property rights may come to his aid. Anything short of this cannot be approved as due process of law." (Citing cases)

In **Montgomery vs. Montgomery,** supra, on page 35 it was observed:

> "* * * the legality of the appointment of Mrs. Montgomery as guardian of her husband is dependent upon the fact that Mr. Montgomery was legally declared to be of unsound mind, and, of course, unless the record furnishes evidence for the exercise of the authority, the appointment itself must fall. In such event the complainant would be without authority to file the bill."

Inasmuch, therefore, as the probate judge at least exercises to a limited extent certain of the powers of a guardian under the statute in question, it is difficult to see how he can legally exercise such powers over the estate of the person alleged to be of unsound mind in the absence of legal adjudication as to such unsoundness. Unless the statute be so construed there would be grave doubt as to its constitutionality for failure to provide due process of law. And in such cases of doubt, the statute must be so construed as to render it constitutional, or remove doubt as to constitutionality.

Under the authority of **Broaddus vs. Johnson,** 235 Ala. 314, to which you refer, I am of opinion that the judge of probate is authorized to pay over the money to the father or mother of a person of unsound mind, as well as to the father or mother of a minor, in case it should be made to appear that it is to the interest of the person of unsound mind so to pay the money. In other words, I think Section 101 of Title 21 applies both to minors and to persons of unsound mind under the rule of construction set out in **Broaddus vs. Johnson,** supra. I find no authority, however, for payment of the money to the custodian of such person of unsound mind except possibly as it may be paid to such custodian from time to time for the maintenance and support of the person of unsound mind.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 15, 1944.

Hon. J. L. Vaughn, City Recorder,

City of Dothan,

Houston County,

Dothan, Alabama.

In the absence of an ordinance or statutory authorization, a police officer cannot accept cash bail in lieu of regular bail bond with surety.

It is within municipal competency to adopt an ordinance providing that a person under arrest for the violation of an ordinance may substitute a cash bail in lieu of liability of the sureties.

A municipality may designate its chief of police as one of the persons authorized to approve bail bonds.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of August 8, 1944, it as follows:

"The following questions are posed with the request for an opinion:

"1. Is a city police officer (Chief of Police) authorized to accept cash bail in lieu of the regular bail with surety, without a city ordinance?

"2. Has a city the power and authority under the Statute to enact an ordinance conferring upon its Chief of Police or other designated officer the right to accept cash bail in lieu of the written bail with surety?

"3. Would an ordinance adopted by the City authorizing the Chief of Police or other designated officer to accept cash bail in lieu of written bail with surety be in conflict with existing State Statutes or would it be a valid and subsisting ordinance?

"You can appreciate the difficulties that the various cities have in enforcement of its ordinances, particular traffic laws, if the State Statutes must be complied with in each arrest. It is to obviate these requirements that information is desired as to whether or not the City has a right to authorize its officer to accept cash bail.

"It will be appreciated if you can give an early opinion to the three questions herein posed."

In my opinion your first question must be answered in the negative. Authorities uniformly hold that:

> "In the absence of a statute conferring such a right a magistrate or officer has no authority to accept a cash bail or deposit of money in lieu of bail." **Butler v. Foster,** 14 Ala. 323; **State v. Owens,** 84 N. W. 529; **Calaway v. Town of Bellefille,** 184 A. 819; **Badolato v. Molinari, 174** N. Y. S. 512; **Commonwealth v. Sitler,** 104 A. 604; **Berume v. Hughes,** 275 S. W. 268; **Kellog v. Witte,** 182 P. 570.

However, whenever such authority is conferred by statute, it has, with equal uniformity, been held:

> "When authorized by statute, a cash bail may be accepted in lieu of the regular bail bond from a person charged with crime." **United States v. Widen,** 32 Fed. 2d. 517; **Rowan v. Randolph** 268 Fed. 569; **Bingham v. Montecalm County,** 232 N. W. 348; **State v. Hart,** 227 N. W. 350; **State v. Evans,** 330 Pac. 1010; for other cases see "Bail, Key No. 73, West's Fourth Decinnial Digest."

In one case (**Rowan v. Randolph,** supra), it was held that a court was without authority to refuse to accept the cash bail in lieu of the regular bail bond with sureties.

It appearing clear that both the State and the Federal Government may by statute authorize a cash bail in lieu of the regular bail bond, your letter presents the question whether or not a municipal corporation may adopt an ordinance to similar effect.

In **Johnson v. State,** 30 Ala. App. 539, 10 So. 2d. 298, Judge Bricken, speaking for the Court, stated:

> "Bail is exacted for the sole purpose of securing the attendance of the defendant at court at all times when his presence may be lawfully required, and his surrendering himself in execution of any legal judgment that may be pronounced against him."

I see nothing in the proposed ordinance that is inconsistent with the laws of the State; instead it appears to supplement the "purpose of bail" as expressed by the Court in **Johnson v. State, supra.**

Section 445, Title 37, Code of 1940, provides:

> "Municipal corporations may, from time to time, adopt ordinances and resclutions not inconsistent with the laws of the state, to carry into effect or discharge the powers and duties conferred by this title, and provide for the safety, preserve the health, promote the prosperity, **improve the morals, order, comfort and convenience of the inhabitants of the municipality,** * * * * * * *" (Underscoring supplied.)

Clearly, the privilege of making a cash deposit of a small sum (and practically all municipal bonds are small) instead of a person having to

contact his friends, business associates, etc., and explaining his embarrassing position of being under arrest, and calling upon them for the favor of becoming his bondsmen, is a matter of comfort and convenience. In view of the above, it is my opinion that it is within municipal competency to adopt an ordinance of the type and nature hereinafter described.

Authority for the designation of the persons authorized to approve appearance bonds of persons arrested for the violations of municipal ordinances is found under Section 407, Title 37, Code of 1940. And, while this Section refers to a municipality having a town or city council, the City of Dothan may exercise its provisions as authorized by Section 45 or 96, same Title, depending upon whether your Commission form of Government was adopted under Article 1 or 2 of Title 37. It is my opinion that the chief of police may be designated as one of the persons authorized to approve appearance bonds.

It is presumed that the proposed ordinance will permit the person under arrest to sign his own bond and the cash bail substituted in lieu of the liability of the now required sureties, the bond containing a provision that the cash bail, in event of the failure of the accused to present himself in the recorder's court at the proper time, shall be applied against the forfeiture adjudicated against the defendant, according to the provisions of the bond.

I am not in position to answer your third question in either the affirmative or the negative without an opportunity to examine a copy of the proposed ordinance. Whether a cash bail in lieu of a written bail bond with sureties will protect a municipality is subject to serious debate, as there would be no agreement or contract against which either a judgment nisi or a judgment final might be entered. However, by permitting the accused to execute an appearance bond, without sureties, a judgment may be entered against him, and the cash bail in lieu of the liability of sureties, applied to the satisfaction of such judgment.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 18, 1944.

Hon. Howard Kirby,

Clerk of the Circuit Court,

Etowah County,

Gadsden, Alabama.

Sheriffs entitled to attendance fee of two dollars when attending county court receiving pleas of guilty—Tit. 13, § 320,—Tit. 11, § 87—Tit. 54, § 5(2)—

Attendance fees—Sheriffs entitled to two dollars when attending county court receiving pleas of guilty—Tit. 13, § 320—Tit. 11, § 87—Tit. 54, § 5(2)—

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of July 24, 1944, is as follows:

"Please refer to opinion rendered on January 29th, 1943, to Hon. L. F. Horn, Sheriff of Crenshaw County regarding Sheriff's fee of $2.00 for attendance each day on Regular and Special terms of County Court, and render to me your official opinion on the following question:

"Often one or more defendants are brought from Jail to enter plea of guilty before the County Court Judge when the case has not been set for a regular or special term. Should I as Clerk issue to the Sheriff a certificate for attendance fee of $2.00 each day there is a plea of guilty by one of more defendants in such instances?"

You are advised, in my opinion, you should issue to the Sheriff a certificate for attendance fees of two dollars for each day there is a plea of guilty by one or more defendants in the instances enumerated above. As you know it is the duty of the Sheriff to attend each term of the county court. Title 13, Section 320, Code of 1940 provides as follows:

"§ 320. **Terms attended by sheriff, etc; his fees.**—The terms of the county court shall be attended by the sheriff or deputy sheriff; and, in their absence, some suitable person shall be appointed by the court to act in their stead, whose compensation shall be two dollars a day, to be paid out of the county treasury."

It is my opinion that when the county court is sitting to receive pleas of guilty from one or more prisoners that this is a term of court that the sheriff is required to attend and, therefore, entitled to the fee of two dollars as

prescribed by law. Title 11, Section 87, Title 13, Section 320, **Code of Alabama** 1940. See 13 **Quarterly Report of Attorney General,** page 119; 30 **Quarterly Report of Attorney General,** page 39; 57 **C. J.,** page 1122, Section 1177; 4 **Words and Phrases,** page 768.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 18, 1944.

Hon. Roy Johnson,

Tax Assessor,

Jefferson County,

Birmingham 3, Alabama.

Code 1940, Tit. 51, §§ 49, 52—Taxation—Personal Property—List of Insolvents—

Personal property ordinarily subject to taxation in county where owner has legal residence or domicile at beginning of tax year, although he may be absent temporarily from the county at the time and has the property with him.

Tax assessor not liable for damages by reason of assessing such property as that of a delinquent and subsequent publication of the delinquent's name in the tax collector's list of insolvents, whether or not the alleged delinquent had personal property in the county subject to taxation.

Opinion by Assistant Attorney General Matthews:

Dear Sir:

Your request for an official opinion, bearing date of July 31, 1944, is as follows:

"The question has arisen in this county, and I have talked with the Examiners of Accounts, and we have read opinions, and have come to the conclusion that your opinion should be asked for on the following:

"1. The Tax Collector must advertise annually a list of insolvents in Jefferson County. That list of insolvents is made up of people who did

not pay their taxes, and this particularly applied to personal property because lands are bought in by the State at tax sales, and they are advertised as delinquent prior to the sale.

"Under Title 51, Section 49, the assessor is obligated to make a demand on every person who fails to make a return. This we do from the previous year's assessment. Naturally, it would be impossible for us, with our limited force, to make a demand on every citizen in Jefferson County, because it would require the mailing out of demand notices to possibly 200,000 people at a cost of postage alone amounting to approximately $45,000. There is no way for us to determine, without going directly to the person or canvassing from house to house, whether or not every person in Jefferson County has made an assessment. Therefore, when a person has made an assessment for 1943 on personal property, and fails to make an asessment in 1944, after demand, we make an assessment against him from information, which information is taken from previous year's assessment. However, in many cases people fail to come in annually, and we make their assessments from information every year and they pay their taxes.

"Now, suppose one of these persons moves out of the county, taking with him his personal property, and is gone for one year, failing to pay his previous year's taxes, or having paid them, and during the time he was out of the county, we make an information assessment, he comes back to the county and finds he is advertised as insolvent, is the tax assessor liable to suit because he has made such an assessment? Section 52 of Title 51 reads that the assessor is to ascertain from inquiry or otherwise the property and other subjects of taxation. It is obviously something that cannot be done in Jefferson County without at least doubling our office force, which the County Commission will not agree to.

"What I am trying to do is prevent advertising some person and laying myself liable to a law suit when that person is actually not insolvent, but has failed to make an assessment because he has moved out of the state either prior to or after the taxes accrue. This is a big question, and one on which I cannot find any sort of an opinion.

"2. The following question arose today:

"Theodore Swann, of Jefferson County, annually for the years 1939 to 1944, inclusive, had his secretary, acting as his agent, to assess his personal property and claim homestead exemption, the amounts of personal property for those years being for household goods, etc., and appeared on the assessment along with his homestead. The amounts for the years above mentioned are respectively, $293.40, $267.66, $267.76, $266.76, $266.76 and $293.94. Mr. Swann, in a hearing before the Hon. Stephen B. Coleman, Referee in Bankruptcy for the District Court of the United States, disclaimed the ownership of the personal property, and his wife laid claim to it. The question now arises as to whether or not the assessor can go back, inasmuch as the property was assessed for those years erroneously in the name of Theodore Swann, and not his wife, for a period further than five years, and make an escape assessment, if an escape assessment is the proper thing to make, against this personal property in the name of Mrs. Theodore Swann, who is the owner, in accordance with the court order of April 25, 1944. Your opinion is requested on the

above, and I enclose herewith a copy of the court order for your information."

Ordinarily personal property is subject to taxation in the county where the owner has his legal residence, or domicile, although he may be temporarily absent and have the property with him. In such cases it is his duty to assess the property, and if he fails to do so (pay the tax when due) any damage he may suffer by reason of such default would be the proximate result of his own negligence, and could not be attributed to any act or omission on your part.

If therefore a legal resident of Jefferson County owned personal property therein on Oct. 1, 1943, subject to taxation for 1944, and after demand, as required by Code 1940, Tit. 51, §§ 49, 52, you assessed said property, and the taxpayer failed to pay the taxes so assessed and his name was published in the "list of insolvents," there is no basis for alleged liability on your part by reason of such publication.

The question is not affected by the fact that the taxpayer took his personal property with him when he left the state, or that it was out of the state on October 1 at the beginning of the tax year, when the state's lien for taxes attached. Such personal property is assessable in the name of the owner in Jefferson County as long as he is a legal resident of the County, although he may have taken it out of the county temporarily. The one material question is whether the taxpayer was a legal resident of, or domiciled in, the county on October 1 at the beginning of the tax year.

Whether an action for damages will lie against you, if in fact the taxpayer had no personal property subject to assessment, but his name was published in the list of insolvents by reason of an erroneous assessment by you, is a question involving so many factors that I hesitate to express an opinion without a detailed, concrete state of all the facts involved. There would in such cases be two material questions to be answered: (a) whether you were guilty of negligence, or breach of duty in making the assessment under all the facts and circumstances; and (b) whether the obligation resulted in actual or presumed damage to the alleged insolvent as a proximate result of your failure to make a demand. 43 **Am. Jur.—Public Officers**—p. 91, § 279; **Eslava v. Jones**, 83 Ala. 139, 3 So. 317; **Bellinger v. Glen**, 80 Ala. 190.

In the case of **Eslava v. Jones**, supra, it was held that where a circuit clerk erroneously issued a writ for the sale of real estate in the possession of plaintiff and said writ was executed by the sheriff by sale of the real estate as the property of another person, plaintiff could not recover damages for expense he had incurred in defending a suit for possession brought by the purchaser at the execution sale.

Said the court: "Though the **venditioni exponas** was a nullity, and the purchaser acquired no title by the sale, the plaintiff could not maintain an action against him, to recover the costs and expenses paid by her in defence of the suit to recover possession of the lands. The bringing of the suit was the act of the purchaser—the intervention of another cause, by which the plaintiff cannot pass, and support an action against the clerk to recover damages for which the immediate actor is not suable. Though the illegal and unauthorized act of the clerk may have furnished the occasion, it was not

the efficient and dominant cause, which put the intervening and immediate cause in operation. The issue of the **venditioni exponas** is, as to the plaintiff, **damnum absque injuria.**" (p. 142).

So in the present instance, even if you should erroneously assess personal property not subject to taxation as the property of a delinquent, and as a consequence of the unauthorized assessment the delinquent's name was published by the tax collector in the "list of insolvents," such publication was his act, not yours, and on the basis of decision in **Eslava v. Jones** no liability would attach to you by reason of the publication.

In my opinion you are authorized to assess the personal property of Mrs. Theodore Swann as an escape for the current year 1944 and five years prior thereto, if it was erroneously assessed as the property of her husband during those years, and was not assessed to her as owner.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 19, 1944.

Hon. Roy O. Hill,

Clerk Circuit Court,

Houston County,

Dothan, Alabama.

Probation—Circuit Clerk entitled to fee of two dollars even though probation refused. Title 11, Section 90, Code of Alabama 1940. Title 42, Section 20, Code of Alabama 1940.

Circuit Clerk—Entitled to fee of two dollars even though probation refused. Title 11, Section 90, Code of Alabama 1940 Title 42, Section 20, Code of Alabama 1940.

Costs and Fees—Circuit Clerk entitled to fee of two dollars even though probation refused. Title 11, Section 90, Code of Alabama 1940. Title 42, Section 20, Code of Alabama 1940.

Department of Corections and Institutions—Circuit Clerk entitled to fee of two dollars even though probation refused. Title 11, Section 90, Code of Alabama. Title 42, Section 20, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of August 15, 1944, is as follows:

"The Department of Corrections and Institutions has refused to pay a $2.00 item in cost bill of The State vs. H. G. Barkley which is charged as Probation Fee of Clerk under Title 11, Section No. 90. This case was tried in County Court and, upon conviction, defendant filed application for the benefits of probation, and the papers were properly filed in Circuit Court, where, upon probation hearing, probation was denied by the judge of the Circuit Court and the defendant ordered to begin serving his sentence as imposed in County Court.

"I am advised by the Department of Corrections and Institutions that this item has been eliminated from the cost bill because 'probation was denied.' Section 90 referred to above merely says that the clerks shall be allowed a fee of two dollars for services rendered in probation cases certified from an inferior court to Circuit Court. This provision that the Department can only pay this $2.00 when probation is granted has evidently been written into their code separately as it is not in mine.

"Won't you give me an opinion concerning this matter as early as possible?"

You are advised that the Clerk of the Circuit Court should receive two dollars for all of his services in probation cases certified from an inferior court to the circuit court and, if such fee is not paid by the probationer, should be paid from the funds of the Department of Corrections and Institutions, regardless of whether or not the probation is granted or denied.

Title 11, Section 90, Code of Alabama 1940 provides as follows:

"§ 90. Clerks fees in probation cases.—The clerks shall be allowed a fee of two dollars for all of his services in probation cases certified from an inferior court to the circuit court or other court from which an appeal lies directly to the court of appeals or supreme court, which if not paid by the probationer shall be payable out of the funds of the department of corrections and institutions as other such court costs are now paid."

Title 42, Section 20, Code of Alabama 1940 concludes similarly:

"* * * The clerk shall be allowed a fee of two dollars for all of his services in probation cases certified to the circuit court or inferior court from which an appeal lies directly to the court of appeals or supreme court, which if not paid by the probationer shall be payable out of the funds of the state department of corrections and institutions as other such court costs are now paid."

The statutes quoted above authorizing the payment of a fee of two dollars to the clerk in probation cases does not make the granting of probation a

condition of payment. The services performed by the clerk are substantially the same whether the probation is granted or refused. In the absence of a provision stating that the fee is payable when probation is refused, it is my opinion that it is immaterial so far as the payment of this two dollar fee is concerned whether the benefits of probation are granted or refused to defendant applying therefor. This item of cost should be paid from the funds of the Department of Corrections and Institutions as other costs are paid.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 21, 1944.

Hon. Perry B. Hughes, Jr.,

Clerk Circuit Court,

Sixth Judicial Circuit,

Tuscaloosa, Alabama

Circuit Court cannot allow state witness attendance fees in cases first instituted in the Inferior Court of Tuscaloosa County, under the provisions of Section 89 et seq, Title 34, Code of 1940, and thereafter appealed to the circuit court under section 95, same title.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of June 5, 1944, is as follows:

"Please give me an official opinion on the following:

"Can the State witnesses claim their attendance in a Desertion and Non-Support case in the Circuit Court, which was appealed under Title 34, Section 95, Code of Alabama 1940, from the Domestic Relations Court, which is a part of the Inferior Court of Tuscaloosa County?

"I refer you to the Attorney General's Report 1934-36, Page 191."

In my opinion, your inquiry must be answered in the negative.

"The law of costs must be deemed and held a penal law, and no fee must be taken but in cases expressly provided by law. The fees prescribed in this Code shall be the only fees that can be collected by any officer." Title 11, Section 79, Code of 1940.

Statutory prohibition against costs being taxed in cases arising under Sections 89, et seq., Title 34, Code of Alabama 1940, first appeared in Section 3 of the nonsupport statute (Acts of 1919, page 176). This provision was brought forward into the Code of 1923 at Section 4429, and into the Code of 1940 as the last sentence in Section 102, Title 34. A perusal of the Act creating the Inferior Court of Tuscaloosa County discloses no conflict with this provision.

An opinion was rendered by this office on May 21, 1924, holding that costs could not be taxed in cases of this nature. Biennial Report of the Attorney General, 1922-1924, page 352. See also opinion rendered on June 21, 1935, Biennial Report of the Attorney General, 1934-1936, page 191, referred to in your request, and opinion rendered October 22, 1941, Quarterly Report of the Attorney General, Volume 25, page 78. Each of these opinions, in my judgment, represent a sound interpretation of the law, and I concur therein.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 21, 1944.

Hon. Roy Johnson,

Tax Assessor,

Jefferson County,

106 Court House,

Birmingham 3, Alabama.

Tax Exemptions—Municipal Corporations—Leased Premises—Improvements.

Concrete runways placed by a lessee upon a tract of land leased from a city, in the absence of agreement that such improvements shall be the property of the lessee, become the property of the lessor—city, and are, therefore, exempt from taxation and are not assessable as the property of the lessee.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of July 26, 1944, is as follows:

"The Defense Plant Corporation property, in so far as real estate is concerned, is assessable and we have accordingly assessed it throughout the State of Alabama.

"The City of Birmingham owns a fifty-eight acre tract near the municipal airport, which, of course, was tax exempt. They leased the fifty-eight acre strip to the Army Air force for $1. per year. The Bechtel-McCone-Parsons Corporation, who operates a modification plant adjoining this strip of land, under contract improved for the Defense Plant Corporation the fifty-eight acre strip in question by putting down concrete run-ways. They spent approximately one-half million dollars on these improvements, the property being owned by the city, leased to the Army Air Force, and improved by the Defense Plant Corporation through its agent Bechtel-McCone-Parsons Corporation.

"Please advise me whether or not the concrete run-ways on the property should be assessed to the Defense Plant Corporation."

Obviously the improvements to the city's tract of land, consisting of concrete runways, are of such nature and have been so annexed or attached to the land as to have become a part thereof, and so far as now appears will not be subject to removal by the lessee upon expiration or termination of its lease. In the absence of any showing or agreement to the contrary it is assumed that when the lease expires title to the improvements will vest in the lessor absolutely.

In such cases ordinarily improvements are taxable to the lessor and he is liable for the taxes on them at the time they are erected and become affixed to the realty. 32 Am. Jur.—Landlord and Tenant—269, § 288(10).

Under the Alabama statute improvements so annexed or attached to land as to pass to a vendee upon conveyance thereof are deemed real property for purposes of taxation. Code 1940, Tit. 51, § 1(b).

Likewise in the absence of an agreement making it the duty of the lessee to pay taxes or assessments against the leased premises that burden falls upon the lessor. **Freeman vs. State,** 115 Ala. 208, 22 So. 560.

In the present instance however the lessor is a municipal corporation and its property is exempt from taxation. Const. 1901, § 91; Code 1940, Tit. 51, § 2(a).

I am of opinion, therefore, in the absence of any showing that the lessee has reserved title to the improvements or the right to remove the same upon expiration of the lease, or otherwise, that lessee is not liable for taxes on the leased premises or the improvements placed thereon.

Upon submission of a copy of the leases in question and the contract for the improvements I will be enabled to answer your inquiry more satisfactorily.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 23, 1944.

Hon. Roy O. Hill,

Clerk Circuit Court and County Court,

Houston County,

Dothan, Alabama.

Clerks, County Courts—Clerk of county court should issue subpoenas at request of proper parties in proceedings for restoration of driving privilege.

County Clerks—Not entitled to fee for issuing subpoenas in proceedings to restore driving privilege.

Sheriffs—Entitled to fee for serving subpoenas in driving license cases.

Witnesses—Entitled to civil fees when testifying in county court in driver's license case.

County Court—Costs and fees incurred in driving license case taxed as other costs. Title 11, Section 65, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of August 15, 1944, is as follows:

"The Code of 1940 provides, under Title 36, Section 68, that a person whose license has been revoked may apply to the County Court with a petition for reinstatement of license, but does not say anything about issuing subpoenas for such proceeding nor for pay of Clerk and Sheriff for issuing same, nor for witness fees for such witnesses.

"Please advise me if the clerk of the County Court should issue subpoenas, on proper request, for witnesses for such a hearing, and, if so, advise how the clerk shall get pay for such service and the sheriff for service of the subpoenas and the witnesses for attending court and how much the witnesses are entitled to.

"Are any other items of cost chargeable in this proceeding?

"If any cost at all is properly chargeable in such a hearing, please advise to whom it shall be charged and the method of getting payment."

(1) In answer to your first inquiry you are advised that, upon a proper request by the attorneys or parties to the cause in a proceeding in the county court for the reinstatement of a driving privilege, you, as clerk of the county court, should issue subpoenas.

(2) You are further advised that the law provides no fee that is payable to the clerk for issuing subpoenas.

(3) The sheriff is entitled to a fee of 65 cents for serving subpoena and making his return.

(4) Witnesses should be paid as are witnesses in civil cases, $1.50 per day plus mileage.

(5) The costs enumerated above should be taxed by the court and collected as in other civil cases pursuant to Title 11, Section 65, Code of Alabama 1940.

(1) Title 36, Section 68, Code of Alabama 1940 provides that when driving license is cancelled, suspended or revoked, the licensee is entitled to a hearing on the matter in the county court. Said section is in the following language:

"* * * Any person denied a license or whose license has been cancelled, suspended or revoked by the director of public safety except where such cancellation or revocation is mandatory under the provisions of this article shall have the right to file a petition within thirty days thereafter for a hearing on the matter in the county court, circuit court or court of like jurisdiction in the county wherein such person resides, and such court is hereby vested with jurisdiction and it shall be its duty to set the matter for hearing upon thirty days' written notice to the director of public safety, and thereupon to take testimony and examine into the facts of the case and to determine whether the petitioner is entitled to a license or subject to suspension, cancellation, or revocation of license under the provision of this article."

Since the statute vests the county court with jurisdiction to hear and determine whether or not a driving privilege should be restored, it is my opinion that the hearing referred to in this statute includes a fair hearing, together with all of its accustomed incidents. A hearing would be of no value without the testimony of witnesses and for this reason it is my opinion that the clerk of the county court is authorized to issue subpoenas to witnesses requested to be summoned by the parties or their counsel. All courts have

the inherent power to compel the attendance of witnesses necessary to the trial of causes. 70 C. J., page 34, Section 3. **Jackson vs. Mobley,** 157 Ala. 408, 47 So. 590.

(2) Here it should be stated that I find no provision of law authorizing the clerk of the county court to charge a fee for the issuance of a subpoena to a witness in a proceeding of this type. Title 13, Section 316 provides that the fees and compensation of the clerk of the county court for their duties as clerks of the county court shall be the same as are allowed by law to the clerks of the circuit court for **criminal** cases. The general law in providing for the payment of fees to circuit clerks who are ex-officio clerks of the county court has provided for the payment of fees in criminal cases only. It is beyond dispute that a hearing on a petition for a reinstatement of a driving privilege under the provisions of Title 36, Section 68 is not a criminal proceeding and bears no characteristics of a criminal proceeding. There is no sworn affidavit; the action is not brought in the name of the State; nor is there any punishment administered. The proceeding is civil in nature and not criminal.

For the same reason the clerk of the county court cannot claim fees under the provisions of Title 11, Section 87, Code of Alabama 1940. This section in prescribing fees begins, "in prosecutions before the county court, the following fees should be allowed for the services specified.' "Prosecutions" refers to criminal cases. Neither can the clerk claim fees for issuing subpoenas under the provisions of Title 11, Section 21, Code 1940, for the fees prescribed in that section are for services performed in the circuit court and not in the county court.

There being no clear provision of law authorizing a fee to the clerk of the county court for issuing a subpoena in a civil case, none can be charged. Title 11, Section 1. It is the duty, however, of the clerk to issue this subpoena when requested since the State may impose duties on public officers without providing compensation therefor. **Mobile County vs. Williams,** 180 Ala. 639, 61 So. 963. Quarterly Reports of Attorney General, July-September, 1939, page 71.

(3) The law authorizing the payment of sheriffs' fees is not subject to the same infirmities as that authorizing clerks fees. See Title 11, Section 34 and Title 11, Section 21, 1940 Code. Title 11, Section 34 provides that:

> "Sheriffs are entitled to receive the following fees for the following services * * * * * * Summoning each witness and returning subpoenas....65"

As you will note this statute does not specify that the fees of the sheriff are to be received while he is acting for a particular court, while the statute authorizing clerks' fees (Title 11, Section 21) provides that the clerks of the circuit courts are entitled to reecive certain fees. The sheriff, therefore, is entitled to a fee of 65 cents for summoning each witness and returning the subpoena. Title 11, Section 34. The sheriff cannot claim his fees in drivers license cases in the county court under the provisions of Title 11, Section 87 for the same reason that the clerk cannot claim said fees under that section. The sheriff may, however, claim said fee under Title 11, Section 34.

(4) Having decided that this proceeding is of a civil nature it is my judgment that witnesses are entitled to their fees as in civil cases at the rate of $1.50 per day and 5 cents per mile mileage. Title 11, Section 44, Code of Alabama 1940.

(5) Costs and fees accruing in the county court on a petition for reinstatement of a driving privilege should be taxed by the court as are costs and fees in other civil cases under the provisions of Title 11, Section 65, Code of Alabama 1940.

You have also asked whether or not any other items of cost are chargeable. If there is any particular cost to which you have reference you should specify this other cost and we shall be glad to render an opinion on the matter.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

August 24, 1944.

Hon. G. R. Dollar,

Judge of Probate,

Winston County,

Double Springs, Alabama.

Winston County—Local Acts 1939, p. 221—Highway Board—Office space—

1. Highway Board of Winston County not authorized to rent office space outside the county courthouse and pay rent therefor out of the county's gasoline tax funds.

2. The Court of County Commissioners of Winston County is authorized to rent such office space and pay rent therefor out of the county's general fund, provided there is not adequate office space available for the Highway Board in the courthouse itself.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of August 19, 1944, is as follows:

"On September 5th, 1939, there was approved a Local Act creating a Highway Board of Winston County. See Local Acts 1939, page 221. This act confers on the Highway Board all the powers and authority theretofore exercised by the Commissioners Court over the public roads and bridges and also gives to it exclusive supervision of all the road and bridge funds for the county derived from any source. It charges them with the duty of building, repairing and keeping up all roads and bridges. There is a Chairman, four members and a Clerk that compose the Board. In the discharge of their duties it is necessary for them to have an office where their records may be kept and where the Chairman and Secretary may perform their duties.

"Under the present conditions there is no room in the county Court House where this Board may be furnished an office. Under the conditions I am asking you to give me an opinion on the following question:

"Under the Local Acts 1939, page 221 has the Wintson County Highway Board the authority to rent an office outside the Court House and pay for same out of the gasoline tax funds that come into its hands?

"Will appreciate an early opinion on this question."

By legislative enactment the powers, duties, and functions of the governing body of Winston County as to roads and bridges have been delegated to a board appointed by the Governor, the members of which hold office for terms coincidental with that of the Governor. Local Acts 1939, No. 333, H. 815, p. 221, approved September 5, 1939.

The act in question expressly provides for compensation of the board members payable out of the county's road and bridge fund, administration of which is vested in the board. (§§3, 5). It is silent however as to offices and office equipment for the board although it requires the members of the board to meet monthly and at other times upon call of the board's chairman. (§2).

It goes without saying that the Court of County Commissioners still functions as the county governing body, stripped, however, of jurisdiction over roads and bridges. The board and the court together now exercise the jurisdiction and powers previously exercised by the court alone. And under these circumstances I am of opinion that the members of the court and of the board are all alike officers of the county within the purview of Code 1940, Tit. 12, § 12, under which the county governing body is authorized "in the event the courthouse is inadequate to supply office rooms for such officers," to "lease such office rooms in a convenient location in the county seat and to pay the rental from the county fund." The "county fund" referred to is evidently the general fund from which the ordinary expenses of county government are payable.

I am of opinion therefore that the Court of County Commissioners of Winston County is authorized, in case of lack of space in the courthouse, to rent office space for the Highway Board in a convenient location in the county site and to pay rent therefor out of the general fund.

It follows that the Highway Board is not authorized to rent office space and pay for same out of the gasoline tax fund, because the duty of providing office space devolves upon the county governing body, and has not been expressly granted to the Board, and need not be implied as indispensably necessary for the functioning of the Board.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 8, 1944.

Hon. S. P. Poyner,

Judge of Probate,

Houston County,

Dothan, Alabama.

Elections—Voting Precincts—Voting Places—Division of Beats—Code 1940, Title 17, Sections 77, 80, 84, 96—

County governing body not authorized

(1) To divide a voting precinct with less than 300 voters into two voting precincts or beats or voting districts; or

(2) To designate more than one voting place in such precinct; or
(3) To call an election in such precinct to determine whether is shall be divided.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of August 29, 1944, is as follows:

"We have one beat in the county containing about 70 square miles which has a voting population of slightly above 100 which under the

voting machine law requires the voting machine, since this county at large has adopted their use.

"It is most inconvenient for the people living considerable distance from the voting place to travel to the one place in the beat designated as the voting place. Please advise me:

"(1) If the Board of Revenue can designate other voting places in that beat to use the paper ballots while using the machine at the principle voting place;

"(2) If you find that additional voting places using paper ballots cannot be established, can the Board of Revenue, by resolution divide the beat, by metes and bounds, into two beats, making an additional beat to the county and thereby reducing the voting in each of the reconstituted beats to less than the required number where voting machines are mandatory;

"(3) Is the Board authorized to call an election to be held in said beat to determine by the vote of the people whether the said beat shall be divided into two beats?"

In an opinion rendered February 2, 1938, (Biennial Report Attorney General, 1936-1938, p. 527) it was held that a county governing body is without authority to divide an election precinct containing less than 300 voters into election districts. See also Code 1940, Title 17, Section 80.

Code 1940, Title 17, Section 84, among other things, provides there shall be in no election district more than one voting place."

Code 1940, Title 17, Section 96, provides that when the use of voting machines is adopted in and for any voting precinct" * * then voting machines must be used in all general, primary, municipal and special elections held hereafter in any such voting precinct."

I find no provision of law authorizing a county governing body to call an election to be held in a beat to determine whether the beat shall be divided into two beats. Title 17, Section 77, authorizes change or division of election precincts only by order of the county governing body itself, in cases where a precinct contains more than 500 voters.

I am of opinion therefore that the answer to each of your questions must be in the negative.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 8, 1944.

Hon. Thomas A. Peavey,

Judge of Probate,

Escambia County,

Brewton, Alabama.

Local Acts of 1943, p. 129—Escambia County—Counties—Board of Revenue—Department of Public Health—Municipalities—Title 37, Sec. 469, 1940 Code.

1. Local Act of 1943 abolishing Court of County Commissioners of Escambia County and creating in lieu thereof a Board of Revenue does not enlarge the power, authority, or jurisdiction of the governing body of the county.

2. County governing body has no authority, either express or implied, to appropriate county funds for the construction and maintenance of public rest rooms in various municipalities of the county for the convenience of visitors to towns and cities of county.

3. The Department of Public Health and not the county governing body must determine whether a given expenditure is within the meaning of "public health."

4. A municipality has authority to construct and maintain public rest rooms for the convenience of visitors to the town from outlying districts and communities under Title 37, Sec. 469, 1940 Code.

Opinion by Assistant Attorney General Cooper.

Dear Sir:

Your request for an official opinion, bearing date of August 18, 1944, is as follows:

"RE: Rest Rooms for Escambia County, Ala.

"You are hereby requested by Escambia County, Alabama, its Board of Revenue, its Chairman and Clerk, and the Judge of Probate of said County, to kindly advise 'The Board of Revenue of Escambia County, Ala. and give said Board your ruling on the following questions hereby propounded to you, namely:—

"1. Can Escambia County, Ala. and its Board of Revenue, provide, obtain, or establish rest rooms for men and women, black and white, in each of the municipalities within said county, the City of Brewton, the Town of Flomaton, and the City of Atmore, for the country people who

come to town from throughout the county whose complaints about the absence of such rest rooms are and have been of long standing. Can this be done with county funds under the health laws and sanitary laws of the state and county, or under any other laws?

"2. Is not full authority for establishing such rest rooms found under the law, including Title 12, Section 12, of the Code of 1940 and Sub-18 and Sub-19 thereof? These provisions seem to authorize the county governing body to appropriate money to promote or enforce the health laws of the State for the benefit of the county and its inhabitants when requested by the State Board of Health; and also to expend money for the purpose of improving the sanitary conditions of the county by establishing sewers and disposal tanks in thickly populated communities.

"3. Is not authority also found in the other sanitary laws and health laws, including Section 73, Title 22 and Section 14, Title 22, Sub-4 and Sub-12 thereof, which governs the county health officer, etc.

"4. Can the county construct such rest rooms and pay for the same on lands of the county; or construct the same on lands of the municipality, reserving the titles to the buildings and the right of removal; can the county require the municipality to maintain such rest rooms, free of cost to the county? Can any of said municipalities erect said rest rooms and receive from the county an appropriation either for the cost of construction or the cost of maintenance?

"5. Can any of said municipalities under Section 492, Title 37, make appropriations and pay for either in whole or in part of the cost of construction or maintenance of such rest rooms under Section 492, Title 37, of the Code, or any other law? In the event the buildings are constructed by the county, either upon lands of the county or upon lands of the city?

"6. Can any of the foregoing be done under Section 14, Title 22, Sub-4 and Sub-12 thereof which provides that the county health officer may make reports to the county governing body as to closets and unsanitary conditions and recommend appropriation of money for such purposes when such recommendations are endorsed by the county governing body?

"7. Is it material, or immaterial whether such rest rooms are constructed or located on county lands or upon lands belonging to any municipality? Can the county, by contract or otherwise, reserve title to the buildings if constructed on municipal lands, and right of removal to secure municipal agreement to maintain such rest rooms in accordance with the sanitary laws?

"8. Can a municipality be compelled, by county contract or otherwise, to maintain said rest rooms in accordance with the health and sanitary laws of the state after they are established with the aid of county funds?

"9. If such rest rooms are constructed by the county at county expense and on lands of the county,—or upon municipal lands with the right of removal if the agreement to maintain is broken,—are such buildings county public buildings within the meaning of the law, including Chapter 15, Title 12? Sections 175-199, Title 12 of the Code of 1940, or under Title 12, Section 12 of the Code of 1940?

"10. Can such rest rooms be established by county contract under Local Act No. 231, page 129-134 of the Local Acts of 1943 and Section 3 thereof? (Creating the Board of Revenue) which provides or seems to provide that the Board of Revenue of this county is authorized for county purposes to make all county contracts deemed necessary.

"11. Must all the foregoing be done with the approval of the State Health officers or County Health Officers or other health officials?

"12. Please, therefore, give answer and give us all the law on the subject and tell us how to go about it and keep within the limit of the law? The county governing body greatly desires to make some provision for the establishment of a rest room in each of said municipalities, three of them within the county, to accomodate country people who come to town. The three municipalities are also anxious to participate and do their part; said rest rooms are to be used by all of the people of the county, but the towns and cities have water works and can maintain them in a sanitary condition, but before any county money is used on these projects the Board of Revenue desires to be sure before it proceeds further on its commitments that the foregoing project is covered by law and approved by you, and all other authorities, and said Board has requested me to write you this letter. Hoping you can find sufficient authority to enable the Board to proceed and that we can receive your ruling as early as possible, we are with great respect and best wishes."

The Board of Revenue of Escambia County has only such authority as has been expressly given to it by the Constitution or the statutes or such power and authority as may be necessarily implied from the express powers granted. **Rhodes v. Marengo County,** 204 Ala. 667, 88 So. 850, **State ex rel. Chilton County v. Butler,** 225 Ala. 191, 142 So. 531; **State ex rel. Tallapoosa County v. Butler,** 227 Ala. 212, 149 So. 260; **Corning v. Patton,** 236 Ala. 354, 182 So. 39. 14 Am. Juris. p. 200, Section 28; 20 C.J.S. pp. 801-803, Section 49.

Local Act No. 231 (Local Acts of 1943, p. 129) abolishing the Court of County Commissioners of Escambia County and creating in lieu thereof the Board of Revenue does not enlarge the powers of the governing body of the county for it provides: ". . . That all general laws of Alabama now in force, and all general laws hereafter enacted governing the jurisdiction, power, authority, and duties of a Court of County Commissioners of this State and the members thereof shall apply to and govern said Board of Revenue . . ."

Your only inquiry, summed up in your question No. 12, stated in various ways in the first eleven questions, is, simply stated: Can the Board of Revenue of Escambia County legally appropriate county funds for the construction and maintenance of public rest rooms to be located in the various municipalities of said county for the convenience of the country people who visit

such municipalities; or, if the county cannot lawfully construct and maintain such rest rooms, are the various municipalities authorized to construct and maintain them?

In an opinion of July 11, 1927, to Honorable G. H. Howard, Judge of Probate of Elmore County, it was held:

> "There is no express authority for the renting by a county of a rest room for ladies, and it is my opinion that there is no provision of law from which authority to rent such building can be necessarily implied." **Biennial Report of Attorney General, 1926-1928, page 217.**

The same reasoning applies to the question of whether the county is authorized to rent a rest room as to the construction and maintenance of one. Therefore, relying on the authority of this opinion, it appears that the county has no authority to appropriate money to provide rest rooms for the convenience of the country people visiting the municipalities of the county.

Your specific inquiries seek to ascertain whether any of the statutes mentioned in them, all of which deal with the county's authority to appropriate money to promote or enforce the health and quarantine laws of the state for the benefit of the county and its inhabitants, authorizes a county expenditure for the rest rooms. None of these provisions expressly confers power on the governing body of the county to appropriate money for the construction and maintenance of rest rooms to be located in the various municipalities. No power to do so is implied. Serving the convenience of country people visiting municipalities in this manner bears no relation whatever, in my opinion, to the public health.

The public health laws of the State are exercised and enforced through the executive authority of the State Board of Health. It has been said that agency's judgment as to whether or not a given expenditure of funds for public health was within the meaning of the term "public health" is controlling in a dispute between the county and the agency. **Tuscaloosa County v. Walker,** 235 Ala. 293. This does not mean, however, that the State Department of Public Health can determine that any given condition relates to the public health if the condition does not reasonably relate to health in fact.

It is my judgment that the Board of Revenue of Escambia County is prohibited from appropriating money for the construction and maintenance of rest rooms as you propose, but it is my further opinion that the various municipalities of the county may legally erect and maintain such rest rooms under the authority of Title 37, Section 469, 1940 Code, which is as follows:

> "Sec. 469. Jails, hospitals, morgues, public baths, etc.—All cities and towns of this state shall have the power to establish, erect, maintain, and regulate jails, morgues, **houses of refuge, station** houses, and prisons, **public baths,** and **bathhouses;** to own, establish, maintain and regulate public hospitals, and to purchase and provide for any and all things which may be deemed advisable or necessary thereto, and to receive donations and bequests of property or money in trust or otherwise, for the exercise of all such power, rights and duties incident to the same."

It may be observed that the municipality is the logical authority for providing a rest room for the convenience of visitors. Municipalities attempt in many ways to draw visitors for the development of trade areas. Providing convenient, clean, and sanitary rest rooms is one way to attract visitors from outlying districts and communities.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 11, 1944.

Hon. R. E. King,

Tax Collector,

Mobile County,

Mobile, Alabama.

Tax Assessors—Tax Collectors—Merit System—Mobile County—Title 15, Sections 53 and 103, Code of 1940—Local Acts of 1935, page 141.

The Tax Collector of Mobile County is not authorized under the provisions of Act No. 242, Local Acts of 1935, page 141, to pay the salary of three Tax and License Inspectors to be employed in the office of the Tax Assessor, where the duties of said investigators, as set up by the Personnel Board of Mobile County, include the making of investigations where changes in assessments are necessary, investigations of violations of license laws, and other duties totally disconnected with the Tax Assessor's office.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of August 3, 1944, is as follows:

"Mobile County has and still is having quite a clamor for an increase in the total valuation of the tax assessments in order to derive more revenue.

"Under a local law (H473—Taylor, approved August 15, 1935) the salaries of the Assessor's office are paid from funds withheld by the Tax Collector from the first taxes collected.

"The employment of practically all clerks is done through the office of the Personnel Board and on the certification to the different appointing authorities, by the Director of Personnel. In this connection I am not in any way questioning the right of the Director to certify any clerk or clerks to anyone, nor the right to employment of them by the appointing authority.

"Mr. H. M. Touart, Tax Assessor, has elected, under authority of the duties of his office, to make a thorough investigation of all escaped property, and has requested three additional clerks from the Personnel Board, as per copy of his letter attached.

"The Personnel Board at a regular meeting agreed and approved this request, and certified to Mr. Touart, Tax Assessor, the names of the qualified persons under the title of 'Tax and License Investigator.' A copy of the specifications of this classification is attached. I am also attaching copies of correspondence I have had with both Mr. H. T. Pillans, Director of Personnel and Mr. Touart, Tax Assessor.

"The question that has me worried and I would like you to give me an opinion on is,

"Can I, without liability, either personally or on my official bond, pay the salaries of the three clerks in question under the classification of 'Tax and License Investigators,' bearing in mind that if I can pay them, that under the above local law, I must charge the State, County and Schools with its separate part of the expense? In this connection, Mr. Pillans, advises me that a clerk does not necessarily have to perform all the duties as listed under a certain classification.

"The reason of this request is because of the Supreme Court's decision in the case of State ex rel Towle v. Stone, County Treasurer, 181 So. 281, and I am of the belief that it is applicable to the present situation.

"It is my belief after serious and thoughtful consideration, that this case which sent up from Mobile County, definitely holds, that if the special service of the employee is in conflict with the duties and authority and responsibility of the Board of Equalization as presently set up for Mobile County, that his services could not be paid for by the treasurer, Mr. Stone of Mobile County, Alabama. If that is true, then it seems to me necessarily to follow that if the services of these contemplated Tax and License Investigators extend beyond the discovery and assessment of escaped taxes, and they attempt to bring about changes in assessments, whether lowered or raised, which are already returned and recorded on the records of the Tax Assessor, that their services would then be directly in conflict with the duties, authority and responsibility of the Board of Equalization and that I, as Tax Collector of Mobile County, Alabama, could not properly pay them their salaries. This seems to me necessary to follow because of the fact that they surely have no authority or right to make any change in an assessment which has already been returned, as this is limited to the Board of Equalization, functioning in its capacity of reviewing the assessments in the Tax Assessor's office.

"You will note that I have underlined in the documents attached, statements which would clearly contemplate both on the part of the Tax Assessor and the Civil Service Board of this County, the thought that part of their duties would be to seek such changes."

According to the letter from Mr. Harry M. Touart, Tax Assessor, Mobile County, written to Mr. Harry Pillans, Personnel Director, Mobile County, under date of June 27, 1944, (a copy of which is attached to your request), Mr. Touart requested three additional Tax and License Inspectors to enable him "to check the real property in Mobile County for the purpose of assessing escape improvements, and also checking the mercantile businesses as to their stock of merchandise and furniture and fixtures."

The Personnel Board, in making up the specifications of the classification for the employees requested by Mr. Touart, according to a copv of such specifications attached to your request, lists the following duties as examples of the work to be done by said employees:

"Examples of Work: (Note: The following examples are intended to be illustrative only of the various kinds of work performed in the class.) Makes inspections of business places to see that owners have paid merchandising and other license fees; investigates complaints of law violations by gathering evidence, and by testifying in court cases; makes special investigations of law violations of orange producers and dealers during orange marketing season; locates persons failing to make personal property assessments and reports them to a superior; reports real property assessments to the County Tax Assessor, and makes investigations where changes in assessment are necessary; serves as tax collector for the village of Citronelle; does related work as required."

It will be noted that the duties to be performed by the said employees under the classification set up by the Personnel Board cover a much larger field of employment than that set out in Mt. Touart's letter referred to above.

It is the duty of the tax assessor to see that all taxable property in the county is returned for taxation. Under the provisions of Title 51, Section 53, Code of Alabama 1940, it is the duty of the tax assessor, when he discovers that any such property has escaped taxation, to make an escape assessment of the same.

Under the provisions of Title 51, Section 103, Code of 1940, it is "the duty of the boards of equalization to inspect, review, revise and fix the value of all the property returned to or listed with the tax assessor for taxation each year." No duty is imposed upon said board nor are they authorized by law to make escape assessments. The board is only authorized to adjust tax valuations on property which is returned to or listed with the tax assessor.

The Personnel Board, in setting up the specifications of the classification for the position of Tax and License Investigator, included in the duties to be performed by such investigator the making of "investigations where changes in assessments are necessary." Under the provisions of Section 103, supra, the board of equalization is vested with the sale authority to inspect, review, revise and fix the value of all property returned to or listed with the tax assessor, and this authority cannot be delegated to any other board or person.

The Personnel Board, in attempting to place the duty on a person employed in the office of the tax assessor to make investigations where changes in assessments were necessary, placed an obligation and expense on said office which is not authorized by law, and, therefore, an expense which the tax collector is not authorized to pay under the provisions of Act No. 242. Local Acts of 1935, page 141.

In the case of **State, ex rel Towle v. Stone,** 236 Ala. 82, 181 So. 281, the Court had under consideration a situation analogous to the one presented by your inquiry. In this case, the Court held that the Mobile County Board of Revenue and Road Commissioners had no authority to contract for rendition of services before the Board of Review relating to appraisal of taxed property, and a person who rendered such services though beneficial to the county could not compel registration for payment of warrants issued by authority of the Board of Revenue and Road Commissioners. In so holding the Court made the following statement: "The matter of adjustment of tax valuation rested with the Board of Review. Neither the county, nor its Board of Revenue were delegated any duty or authority in relation thereto."

The specifications of classification for the position under consideration also contemplates that such employee shall investigate violations of the license laws, and perform other duties totally disconnected with the tax assessor's office. Compensation for such services is clearly not an expense connected with the office of the tax assessor, and the tax collector would not be authorized, under Local Act No. 242, supra, to pay a person for performing such duties.

The premises considered, it is my opinion that you are without authority to pay the salaries of the three employees in question under the classification of "Tax and License Investigator" as set up by the Personnel Board of Mobile County.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 12, 1944.

Hon. H. F. Phelps,

Deputy Sheriff,

Montgomery County,

Montgomery, Alabama.

Code 1940, Title 7, Sections 849, 876—Attachment—

Where plaintiff in attachment makes bond as required by Code 1940, Title 7, Section 849, if defendant fails to make bond for replevy of the attached property as provided by Title 7, Section 876, the attached property remains in the possession of the sheriff pending final judgment in the attachment suit.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of August 28, 1944, is as follows:

"Re: Replevin Bonds in Attachments.

"I am requesting an official opinion as to replevy of property in attachments.

"Section 876, Title 7, Alabama Code, 1940, states:

" 'Defendant in attachment may replevy goods or chattels attached, by executing bond, with sufficient sureties, payable to plaintiff in double value of property replevied . . . . . , with condition that if defendant fail in the action, the principal in the bond, or his sureties, will return the specific property attached within 30 days after the judgment.'

"I am desiring to know, for my own protection, that in event the defendant fails within 5 days after attachment, to make a replevin bond does the plaintiff have to make said bond and take possession of the property or leave it (property) in hands of sheriff? In detinue, if defendant fails to make replevin bond in time allowed by law, the plaintiff must file a replevin bond and take possession of the property or it is then returned to possession of the defendant.

"The above section does not state that the plaintiff make replevin bond in event defendant fail. I am of the opinion that if the defendant fails the plaintiff should make bond or return property to possession of defendant.

"I will appreciate you giving me your opinion in said matter as soon as possible."

Plaintiff in attachment is required upon suing out an attachment (except where defendant is a nonresident) to execute a bond payable to defendant conditioned to prosecute the attachment to affect and to "pay defendant all such damages as he may sustain" etc. Code 1940, Title 7, Section 849.

Defendant may replevy personal property levied upon by executing bond payable to plaintiff conditioned to return the same, if he fail in the action, within thirty days after judgment. Title 7, Section 876.

This right on the part of defendant may be exercised, in my opinion, at any time prior to rendition of judgment against him.

If however he fails so to exercise this right the property levied upon must remain in custody of the law, and there is no obligation on the part of plaintiff to make any additional bonds. The original attachment bond will protect the defendant, and the property remains in the possession of the sheriff pending final judgment in the attachment suit.

There is in such cases no provision of law whereby plaintiff may make a replevin bond and take possession of the attached property.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 18, 1944.

Dr. B. F. Austin,

State Health Officer,

CAPITOL.

Public Health—County Health Officer—Financial Responsibility—

1. There is no legal measure of responsibility as between counties and cities for promoting a county wide health program.

2. Counties authorized, but not required, to appropriate funds for health work.

3. In counties with a health officer cities with population of 5,000 or more required to appropriate funds for health work.

4. Counties and cities should share the expense of health work on a basis of population but there is no way to enforce an equitable participation as between them.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of August 28, 1944, enclosing a letter dated August 24, addressed to yourself from Dr. George A. Dennison, County Health Officer of Jefferson County, from which I quote as follows:

"We would like to direct the following question to the Attorney General and ask his opinion:

"What is the joint responsibility of county and city governments in financing a county-wide public health program?

"This question arises from time to time between the City of Birmingham and Jefferson County. It has arisen again relative to responsibility of housing the Health Department and of proportionate participation in providing funds for a new building. Birmingham reproaches the smaller municipalities because of their very limited support of the entire program.

"I am attaching an opinion rendered by Mr. Deramus, County Attorney, which appears to make reference to pertinent laws. It does not refer to the provision whereby the President of the County Commission is the only member of local governing bodies who is an ex-officio member of the Board of Health, or to the implications that this may involve.

"Questions frequently arise as to the proportion of funds spent for public health in the various urban and rural areas. The impossibility of arriving at an exact figure is, of course, obvious as we conduct a single over-all program. It can be approximated, however, with considerable difficulty within an error of not more than 20 percent.

"Any help that can be given us will be of assistance in solving current difficulties. The City Attorney, Mr. Willis, is writing an opinion for the City Commission, which apparently will not be available for some time."

In reply to your inquiry the following is submitted:

The only pertinent provisions of law with reference to "the joint responsibility of county and city governments in financing a county-wide public health program," so far as I can discover, are found in Sections 5, 6, 8, 12, 13, 14(12), 15, 16, 44, and 56 of Title 22 of the Code of 1940.

The sum and substance of the statutory provisions is that counties are authorized but not required to establish county boards of health, to employ county health officers, to furnish and equip offices for such officers and to appropriate county funds for such purposes, subject to general supervision and control of the State Board of Health. Such appropriations may be made either by levy of a so-called special tax, as a part of the general 5-mill tax (Const. §215) or by budget or out of the general fund (§§ 5, 14(12), 15-16).

Cities and towns themselves are prohibited to create health departments or appoint health officers and must obviously depend on county health officers and departments for protection.

The only mandatory provision is that in counties with a health officer cities with a population of 5,000 or more are required to provide funds "properly to safeguard the public health and promote sanitation within the corporate limits of the municipality," for which purpose they may make appropriations. § 13.

This statute does not, however, lay down any formula or provide any "yardstick" whereby the measure of municipal liability may be determined, and so far as appears compliance therewith is left to the judgment and discretion of the municipal governing body.

Finally it is provided that "except as otherwise provided by law, salaries of all employees and the cost of all supplies and other expenses necessary to make operative the provisions of this chapter (i.e. health laws and regulations) shall be paid by the State Board of Health out of the general appropriation made by the legislature for public health work" (§44); and that in counties without health officers or adequate provision for health work, the State Board "may appoint properly qualified sanitary officers to act as health officers," etc. (§ 56).

I am of opinion therefore that there is no legal standard of liability or responsibility which can be enforced by legal process or coercive action in the matter of adjusting financial obligations as between counties, cities and towns for county-wide public health programs. The only fair basis of apportionment would seem to be on the basis of population, but I know of no method whereby such a basis may be enforced.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 19, 1944.

Hon. W. W. Hill,

Judge of Probate,

Montgomery County,

Montgomery, Alabama.

Licenses—Beauty Parlors—Title 51, Sections 473, 549, Code of 1940.

A person engaged in the business of hair dressing, facial treatments, manicuring, or hair waving in her home, whether she employs any operators or not, is subject to the license levied under the provisions of Title 51, Section 473, Code of 1940.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, dated September 11, 1944, is as follows:

"Under Title 51, Section 473, Beauty Parlors, it states that each person operating what is generally known as a beauty parlor shall pay a certain license. Under Section 549, manicurists, hair dressers or administering facial treatments, which is identically the same work done in a beauty shop, there is another license.

"The question we would like to have decided is that if a person operates in her own home and does not employ any operator but does the work herself and has the proper machinery to do it with, **but this is known as a home, not a beauty parlor,** is she liable to license under Schedule 473 or under Schedule 549?

"There are several operators that do their work in their homes. Of course, their customers are limited and they do not operate regular beauty parlors but they do the same type of work in the home.

"In some instances we have issued a license under Schedule 549 but the license inspector has cited them under Schedule 473.

"As the license year is just about to begin I will thank you to give us a very prompt response."

It is my opinion that a person engaged in the business of hair dressing, facial treatment, manicuring, or hair waving in her home whether she employs any operators or not is subject to the license levied under the provisions of Title 51, Section 473, Code of 1940, which Section is as follows:

"§ 473. Beauty parlors, etc.—Each person operating what is generally known as a beauty parlor, or other place where hair dressing, facial treatments, manicuring, or hair waving is done shall pay a license of ten dollars and for each operator so employed, as follows: In cities of more than sixty thousand inhabitants, six dollars. In cities of less than sixty thousand inhabitants and all other places whether incorporated or not, four dollars. This schedule of fees shall apply to beauty parlor colleges where said colleges engage in beauty parlor work for which a charge is made or material used is charged therefor."

Under the provisions of the above Section, it is not necessary that the operations set out therein be done in "what is generally known as a beauty parlor." The statute applies to such operations when they are done in some "other place." This Section is designed to cover any established place of business where such operations are done, whether they are done in what is commonly known as a beauty parlor or some other place like a home. The fact that such operations are done in the home of the operator is not material as long as such operator is engaged in the business of hair dressing, facial treatments, manicuring, or hair waving.

Title 51, Section 549, Code of 1940, the other Section referred to in your request, provides as follows:

"§ 549. Manicurists, hair dressers, etc.—For each person engaging in the business of manicuring, hair dressing, or administering facial treat-

ments, five dollars, provided this section shall not apply to such persons employed in beauty shops and beauty shop colleges, paying the license as provided under section 473 of this title."

In making a distinction between the field of operation of Schedule 21 of the Revenue Act of 1935, General Acts of 1935, page 447 (Title 51, Section 473, Code of 1940, supra) and Schedule 86, General Acts of 1935, page 474, (Title 51, Section 549, Code of 1940, supra), it was held in an opinion of this office rendered to Hon. Edgar Underwood, Judge of Probate, Franklin County, under date of September 17, 1936, Biennal Report, 1934-1936, page 812, "that Schedule 21 is intended to cover all Beauty Parlors operating as such and all persons operating in them, while Schedule 86 is directed at persons engaged 'in the business of manicuring, hair dressing or administering facial treatments' and not employed in a Beauty Parlor of beauty college. Thus a manicurist plying her trade, as such, in a barber shop would be subject to the license imposed by Schedule 86, as also would be an itinerant beauty operator; while a manicurist operating an established Beauty Parlor would be liable for the license tax levied by Schedule 21."

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 20, 1944.

Hon. Ben P. Singleton,

Chief Examiner of Public Accounts,

CAPITOL.

Code 1940, Tit. 51, §§ 30, 191—Tax Assessor's and Collector's Commissions—Special Taxes created by Local Act—Constitution, 1901, §§ 104(15), 215—

So-called special taxes authorized by local act to be levied by counties from the five mills permitted to be levied under the Constitution, 1901, § 215, are legislative appropriations from the counties' general fund, and not special taxes within Code 1940, Tit. 51, §§ 30 and 191 on which tax assessors' and collectors' commissions are calculated at the rate of two per cent.

Opinion of Attorney General, Quarterly Reports, Vol. 24, p. 102 overruled.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of August 28 reading as follows:

"Please refer to your Opinions on pages 61 and 347 of Volume 17, page 102, Volume 24, and your Opinion of August 1, 1944, addressed to Mr. M. B. Lawrence, Field Supervisor of Accounts, in answer to Mr. Lawrence's request Number 461.

"From a reading of the above four opinions you will see that the one on page 102 of Volume 24 reaches a different conclusion from that reached in the other three. The letter to Mr. Lawrence dealt with commissions of the Tax Assessor and the Tax Collector in Escambia County. As a matter of fact, Conecuh, Escambia, and Baldwin Counties each have special laws dealing with the allocation of the General Tax Levy of 5 mills authorized by Section 215 of the 1901 State Constitution.

"In the light of the fact that the Opinion in Volume 24, differs with the other opinions, I should like your specific consideration as to whether or not the Volume 24 Opinion now controls, insofar as your Office is concerned, in the light of the two previous Opinions above mentioned and your Opinion under date of August 1, 1944."

The opinion above referred to, in Quarterly Reports, Attorney General, Vol. 24, p. 102, rendered July 28, 1941, to Hon. M. H. Wilkins, Tax Collector of Baldwin County, in effect discredited and overruled the two opinions in Vol. 17, pp. 61 and 347. It was based upon the fact that there had been inserted by way of amendment of the general law as to commissions of tax assessors and collectors, with reference to "sliding-scale" commissions a sentence reading as follows:

"The commission herein provided for is, to be calculated on all collections for the general fund of the State and County."

From this the deduction was made that as to all other collections, including so-called "special taxes" created by local law out of the five mills referred to in Section 215 of the Constitution, the flat two per cent commission would apply.

The general trend of decision in the Supreme Court would seem to indicate that such so-called "special taxes" created by local act and taken and set aside in special funds out of the five-mill limitation under the Constitution, are merely legislative appropriations, or "allocations" out of the "constitutional limit of one-half of one per cent authorized to be levied by the county for general purposes." **Comm'rs. Court v. City of Anniston, 176** Ala. 605, 58 So. 252; **Board of Revenue v. State ex rel City of Birmingham, 177** Ala. 138, 54 So. 757; **So. Ry. Co. v. St. Clair County,** 124 Ala. 491, 27 So. 23; **Francis v. So. Ry. Co.,** 124 Ala. 544, 27 So. 22.

Thus, it would seem that for many years, both legislatively and judicially, it has been considered that the 5-mills ordinarily levied and authorized as a limit of county taxation, except for the 2½ mill road, bridge and building special tax, and special county wide and district school taxes, is a levy for

general purposes, although the legislature may authorize or direct application of parts thereof to "special" purposes and to the creation of "special funds."

Only on this theory may the validity of such taxes be sustained. If the legislature by local act should undertake to direct assessment and collection of such taxes in a manner at variance with general law, the attempt would be abortive under subdivision 15 of Section 104 of the Constitution which forbids local legislation "regulating either the assessment or collection of taxes" except in cases not material here.

With reference to said Subdivision 15 it has been said that it is "aimed at local legislation tending to confuse the authorities in the administration of the elaborate system of laws regulating the assessment and collection of taxes." **Sisk v. Cargile,** 138 Ala. 164, 172.

In **Bridges v. McWilliams,** 228 Ala. 135, 137, 152 So. 457, it was said:

> "The dominating purpose of section 104 of the Constitution was to destroy the practice of 'legislative courtesy' in the enactment of legislation on the subjects enumerated therein; and to compel the enactment of general laws covering these subjects, providing a uniform system applicable to the state as a whole, in respect to the agencies provided for the assessment and collection of taxes."

If the legislature by local act may designate as special taxes various fractions or parts of the five mills permitted under Section 215 of the Constitution, there would seem to be no good reason why in certain counties it could not so designate the entire five mills ordinarily levied for general purposes and in that case under the reasoning indulged in our opinion in Volume 24, p. 102 of the Quarterly Reports, the effect would be to create by local Act a scheme for assessment and collection in violation of the Constitution.

Moreover, in my opinion, in framing the legislation as to commissions payable to tax assessors and collectors (Code 1940, Tit. 51, §§ 30, 191) and fixing a flat rate of two per cent on "special taxes" and "special county and district school taxes levied for school purposes," the legislature, aside from the school taxes, had in mind only the special road, bridge and building tax permitted under section 215 of the Constitution. If it had intended the flat rate to apply to the type of so-called special taxes created by local act in the counties of Conecuh, Escambia and Baldwin, that situation could have been easily provided for and clarified by the use of a few apt words.

I am of opinion, therefore, that the two opinions in Volume 17 of the Quarterly Reports to which you refer should be followed in the matter of computing commissions for tax assessors and collectors, and that the opinion in Volume 24 should be with-drawn as ill advised.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

September 20, 1944.

Hon. John L. Whatley, President,

Board of Commissioners,

Lee County,

Opelika, Alabama.

Drivers License—Department of Public Safety—

Pending appeal for driving while intoxicated suspension of driving license or privilege is within discretion of the Department of Public Safety.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of August 21, 1944, is as follows:

"Please let us have your opinion in the following matter:

"A defendant was convicted in the Recorder's Court of the City of Opelika for driving while intoxicated. He was fined $100.00 and his driver's license taken up by the City Recorder, who thereupon sent the license to the Department of Public Safety in Montgomery, Alabama, together with a report of defendant's conviction.

"Thereupon the Department of Public Safety at Montgomery returned the license to the Recorder, and a copy of the letter of the Department returning the license is enclosed herewith, which is self-explanatory.

"It was our impression that when a defendant was convicted of driving while intoxicated it was mandatory that the Department of Public Safety cancel or suspend the license; that thereupon, after suspension, the defendant under the statute had the right to petition the Circuit Court of Lee County, Alabama, for a hearing, giving the Department of Public Safety notice of the filing of said petition, such petition to be filed within 30 days after conviction.

"In this connection see Title 36, Code of Alabama of 1940, Sections 2 and 68. See also **Rep. Atty. Gen., April-June, 1940, p. 213** and the case of **Ex Parte Smith, 30 Ala. App. 24, 200 So. 114.** This case held that under provision that director of public safety shall revoke driver's license of one convicted of driving automobile 'while intoxicated,' it became mandatory for director to revoke license of one convicted of driving automobile 'while under influence of intoxicating liquor,' and inferior court of county was without authority to entertain such driver's petition for and order restoration of license, etc.

"The defendant is demanding of the City the return of his driver's license which was returned to the City by the Dept. of Public Safety. Defendant has taken an appeal from the judgment of the Recorder's Court to the Circuit Court of Lee County, Alabama, and it is the position of the city that it has no right to turn the license back to the driver before hearing in Circuit Court. However, there remains the fact that the Department of Public Safety did not suspend the license but returned it to the city.

"We will appreciate your advising:

"1. Should the license be returned to the driver pending his appeal to the Circuit Court?

"2. Has the State Department of Public Safety the right to refuse to suspend the license of the driver convicted in the Recorder's Court, and return the license to the city?

"Your opinion will be very much appreciated for guidance in this and future cases of this kind.

"P. S. You will note the State Department of Public Safety has suggested that the City procure your opinion, and we cannot understand why the Department itself did not request the opinion."

It is my opinion that the State Department of Public Safety has the right to refuse to suspend the license of a driver convicted in a recorder's court as outlined in your inquiry and that the license should be returned to the driver pending his appeal to the Circuit Court.

There are two separate methods by which a person may be prohibited from driving a motor vehicle upon the public highways of Alabama. One method is by an order of the court that has convicted a defendant for driving while intoxicated. Title 36, Section 2, Code of Alabama 1940 provides that upon a conviction for driving while intoxicated "the court trying the cause shall have authority to prohibit and must prohibit the person so convicted from driving any motor vehicle on the public highways of this state for a period not to exceed one year." Therefore, when the driver was convicted in the recorder's court, it was the duty of the recorder, upon finding the driver guilty of driving while intoxicated, to enter an order prohibiting the defendant from driving an automobile for some period not to exceed one year. From the facts stated in your inquiry it does not appear that such an order was made. It is, therefore, my conclusion that this defendant is not prohibited from driving upon the public highways by order of the court.

Even though a person is convicted for driving while intoxicated he is not immediately prohibited from driving an automobile if the defendant takes an appeal. Title 36, Section 54, Code of 1940, after providing for a penalty for the violation of a court order prohibiting the driving of an automobile, further provides that "any defendant against whom such an order has been entered shall have the same right of appeal and supersedeas as is now granted him with reference to the sentence of the court imposing punishment fixed by law, and the appellate court shall have the right to modify or annul

the order forbidding the operation by the defendant of motor vehicles, as in the opinion of the appellate court the facts may justify or require."

Therefore, when a defendant is convicted in a recorder's court for driving while intoxicated and takes an appeal to the Circuit Court, the order of the court, if there be such order, prohibiting the dependant from driving an automobile for a period not to exceed one year is superseded by the taking of the appeal. Title 36, Sections 2 and 54, Code of Alabama 1940.

Title 36, Section 2, requiring a court convicting a defendant for driving while intoxicated to prohibit the person convicted from driving a motor vehicle for a period not to exceed one year, was enacted prior to our laws requiring drivers' license. See Title 36, Section 59, et seq. The statute (Title 36, Section 2), requiring a court convicting a person for driving while intoxicated to enter an order prohibiting a person so convicted from driving a motor vehicle for a period not to exceed one year, operates independently from the law requiring driver's license. The Court, under the provisions of Title 36, Section 2, enters an order prohibiting the person from driving whether that person has a driver's license or not. See Quarterly Reports of Attorney General, Volume 24, page 208.

The other method by which a person may be prohibited from driving a motor vehicle upon the public highways of Alabama, since a driver's license is now required, is by the revocation or suspension or cancellation of his driver's license by the Director of the Department of Public Safety.

Title 36, Section 68, Code of Alabama 1940, provides for the Director of Public Safety to revoke or suspend a driving license and sets out the conditions authorizing a revocation or suspension. In some instances the Director of Public Safety has no discretion and must by the terms of Title 36, Section 68, Code of Alabama 1940 revoke a license. In other instances the statute authorizes the Director of Public Safety to exercise his discretion in suspending a driving license.

One of the mandatory provisions of Title 36, Section 68, is that "the Director of Public Safety shall forthwith revoke the license of any driver upon receiving a record of such driver's conviction of any of the following offenses, when such conviction has become **final**: * * driving a motor vehicle by a person who is an habitual user of narcotic drugs or while intoxicated." This same Code section further provides that "for the purposes of this article the term 'conviction' shall mean **final** conviction."

It is, therefore, apparent that when the Director of Public Safety receives a court record showing a **final** conviction for driving while intoxicated, he has but one course to take and that is to revoke the driving license of the defendant. This was not done in the case outlined in your inquiry for the reason that the conviction was not final as that term is used in Title 36, Section 68. Upon the conviction in the recorder's court, the defendant in this case has taken an appeal to the Circuit Court where the charge of driving while intoxicated will be tried de novo. Pending appeal, therefore, there is no final conviction requiring the Director of the Department of Public Safety to forthwith revoke the driving license.

Though it is not mandatory that the Director of Public Safety revoke a driving license pending an appeal from a conviction in a recorder's court for driving while intoxicated, the statute (Title 36, Section 68) authorizes the Director of Public Safety to suspend a license under the following circumstances:

> "* * * The director of public safety is hereby authorized to suspend the license of a driver without preliminary hearing upon a showing by court records or other sufficient evidence that the licensee: Has been charged with an offense for which mandatory revocation of license is required upon conviction; is an habitually reckless or negligent driver of a motor vehicle; is an habitual violator of the traffic laws; is incompetent to drive a motor vehicle; * * *"

As outlined in the latter from the Department of Public Safety, dated August 18, 1944, and addressed to Hon. T. C. Tollison, City Clerk and Treasurer, Opelika, Alabama, "it has been the policy of the Director where there is no prior conviction of a serious violation of a motor vehicle law to not suspend drivers license pending an appeal unless there were exceptional circumstances involved in a particular case that was brought to the attention of the Director." In exercising his discretion to suspend a driving license the Director of Public Safety has adopted the above quoted policy to guide him. Evidently in the case outlined in your inquiry, there were no prior convictions of a serious nature, nor were there exceptional circumstances involved in this particular case. The director, therefore, following his policy, determined in his discretion that in this particular case the license should not be suspended pending the final outcome of the charge of driving while intoxicated.

It is my opinion that the Director, in refusing to suspend the driving license pending appeal, acted within the provisions of Title 36, Section 68, Code of Alabama 1940; for the reason that the conviction in the recorder's court was not final since an appeal was taken to the Circuit Court.

You are further advised that the recorder's court in the first instance had the opportunity to prohibit the defendant from driving a motor vehicle; also that if there are any particular circumstances involved in this case, or if there are any prior convictions of this defendant, such information should be brought to the attention of the Director of Public Safety so that he may consider such information in making any further orders in connection with the defendant's driving license.

In conclusion, it should be stated that the case of **Ex Parte Smith**, 30 Ala. App. 24, 200 So. 114, may be distinguished from the facts outlined in your inquiry because in that case there had been a **final** conviction in the Circuit Court for driving while intoxicated and therefore, the Director of Public Safety was required by the statute to revoke the license of the defendant.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

QUARTERLY REPORT, ATTORNEY GENERAL

JULY 1, 1944, THROUGH SEPTEMBER 30, 1944.

INDEX TO VOLUME XXXVI

Page

ACTS (GENERAL AND LOCAL)

GENERAL ACTS 1919:
Page 6 23

Page 983 23

GENERAL ACTS 1927:
Page 348 26

GENERAL ACTS 1939:
Page 300 26

Page 468 19

Page 559 16

GENERAL ACTS 1943:
Page 587 30

LOCAL ACTS 1923:
Page 237 16

Page 272 32

LOCAL ACTS 1935:
Page 141 75

LOCAL ACTS 1939:
Page 221 67

LOCAL ACTS 1943:
Page 129 71

Page 178 41

ADOPTION:
Establishment of legal residence 40

ALABAMA BOYS INDUSTRIAL SCHOOL:
Not subject to tax levied by city of Birmingham 45

INDEX—Continued

Page

ARCHITECTS:
Non-registered—Criminal charges against not justified in absence of proof of venue 7

ATTACHMENTS:
Failure of defendant to make replevy bond—Possession of property 78

BLOUNT COUNTY:
Superintendent of Education elected before operative date of Teachers Retirement System not compelled to retire at 70 16

BOARDS OF EQUALIZATION:
Compensation—How determined 46

Compensation—Unpaid balance prior years—How collected 46

BONDS:
Cash bail—Municipality may adopt ordinance providing for 52

Cash bail—Police officer cannot accept in absence of statutory authority 52

County Service Commissioner—Must execute 30

Replevy—Failure of defendant to make—Custody of property 78

CLERKS OF CIRCUIT COURTS:
Circuit—Acting as ex officio clerk—Inferior courts—Preliminary hearings—No fee for attending 32

Execution issued by Department of Revenue—Sheriff should not collect costs for 37

Probation cases—Entitled to fee even though probation refused 59

CODE OF ALABAMA 1940:

TITLE 7:

Section 666 21

Sections 849, 876 78

TITLE 11:

Section 21 ..... 37, 64
Section 44 64

INDEX—Continued

Page

Section 65 64
Section 87 ..... 55, 64
Section 90 59

TITLE 12:

Section 12 67
Section 118 12
Section 151 21

TITLE 13:

Section 240 19
Section 320 55

TITLE 15:

Section 53 75
Section 103 75
Sections 135, 136 32

TITLE 17:

Sections 77, 80, 84, 96 69

TITLE 21:

Sections 9-14 49
Sections 98-102 49
Section 175 5
Section 178 5

TITLE 22:

Sections 5 et seq. 80

TITLE 27:

Section 1 40

TITLE 29:

Section 201 23
Sections 257, 258 23

TITLE 34:

Section 95 61
Section 102 61

TITLE 36:

Section 2 87

INDEX—Continued

Page

Section 54 87
Sections 57, 59, 66 26
Section 68 87

TITLE 37:

Section 445 52
Section 469 71
Sections 787, 791, 797, 798 34

TITLE 38:

Sections 31, 35 28

TITLE 41:

Section 154, as amended 28

TITLE 42:

Section 20 59

TITLE 45:

Sections 210, 211 5
Sections 67, 70 23

TITLE 46:

Section 18 7
Section 68 64

TITLE 51:

Section 1 (b) 62
Section 2 (a) 62
Section 30 84
Sections 49, 52 56
Section 94 46
Section 191 84
Section 473 82
Section 529 9
Section 549 82
Section 770 37

TITLE 52:

Sections 103-109 16
Section 130 15
Sections 362, 364, 366 16

INDEX—Continued

Page

TITLE 54:

Section 5 (2) 55

CONSTITUTION 1901:

Section 14 45
Section 91 62
Section 94 41
Section 97 21
Section 104 (15) 84
Section 215 84

CONSTITUTIONALITY:

Act No. 294, Local Acts 1943, p. 178, authorizing relief to family of deceased county employee constitutional 41

CORRECTIONS & INSTITUTIONS, DEPARTMENT OF:

Distilling cases—Informer's fee—Payment by when defendant sentenced to penitentiary 23

Probation cases—Circuit clerk entitled to fee even though probation refused 59

COSTS AND FEES:

Circuit clerks—Probation cases—Entitled to fee even though probation refused 59

Circuit clerks—Execution issued by Department of Revenue—Sheriff should not collect cost for 37

County courts—Drivers' license cases—Witnesses—Entitled to civil fees 64

County courts—Drivers' license cases—Sheriffs—Entitled to fee for serving subpoena 64

Distilling cases—Informer's fee—Defendant sentenced to hard labor for county—Payment by county 23

Distilling cases—Informer's fee—Defendant sentenced to penitentiary—Payment from convict fund 23

INDEX—Continued

Page

Inferior Court Tuscaloosa County—Nonsupport cases appealed to circuit court—State witnesses not entitled to attendance fee 61

Inferior Courts—Circuit clerk acting as ex officio clerk of—No fee for attending 32

Sheriffs—Entitled to attendance fee when attending county court receiving pleas of guilty 55

COUNTIES:

Department of Public Health must determine whether expenditure within meaning of "public health" 71

Elections—Voting precincts—Voting places—Division of beats 69

Incompetent veterans—Payment of expense of transportation to veterans hospital 5

Public health work—Expense of—No authority to enforce equitable participation in by cities 80

Public health work, Authorized, but not required to appropriate funds to 80

Public notices—Claims for participation must be filed within twelve months 12

Rest rooms—No authority to construct or maintain in municipalities 71

Service Commissioner—Notary bond—Not entitled to pay premium on 30

Teachers' applications—Expense of obtaining must be paid by 15

COUNTY COURTS:

Drivers' license cases—Costs—How taxed 64

Drivers' license cases—Clerks—Not entitled to fee for issuing subpoenas 64

Drivers' license cases—Witnesses—Entitled to civil fees 64

Drivers' license cases—Sheriffs—Entitled to fee for serving subpoena 64

Sheriffs—Entitled to attendance fee when attending county court receiving pleas of guilty 55

INDEX—Continued

Page

COUNTY SERVICE COMMISSIONER:

Seal of office—Bond—County not authorized to pay premium on notary bond for 30

COUNTY SUPERINTENDENT OF EDUCATION:

Elected before operative date of Teachers Retirement System not compelled to retire at 70 16
Subject to Teachers Retirement System 16

COURTS OF COUNTY COMMISSIONERS:

County Service Commissioner—Notary bond—not authorized to pay premium on 30

Department of Public Welfare must determine whether expenditure within meaning of "public health" 71

Elections—Voting precincts—Voting places—Division of beats 69
Public health work—Authorized, but not required to appropriate funds to 80

Public health work—Expense of—No authority to enforce equitable participation in by cities 80

Public notices—Claims for publication must be filed within twelve months 12

Rest rooms—No authority to maintain or construct in municipalities 71
Teachers' applications—Expense of obtaining must be paid by 15
Winston County—Highway Board—Payment of rent of office space 67

DEPARTMENT OF REVENUE:

Executions issued by—Circuit clerks—Sheriff should not collect costs for 37

DOCKS COMMISSION:

Traveling expense of employees—Not limited by Title 41, Section 154, as amended 28

DRIVERS LICENSES:

Person under 16 may not operate motor vehicle upon public highways 26

INDEX—Continued

Page

ELECTIONS:

County governing bodies—Voting precincts—Voting places—Division of beats 69

ESCAMBIA COUNTY:

Court of County Commissioners—Local Acts 1943, p. 129, does not enlarge power or authority of 71

EXEMPTIONS:

Property leased from city—Improvements by lessee—Exemption from taxation 62

Alabama Boys Industrial School—Not subject to tax levied by city of Birmingham 45

FRANKLIN COUNTY:

Law and equity court—Circuit clerk acting as ex officio clerk—Preliminary hearings—No fee for attending 32

GUARDIAN & WARD:

Insane persons—Appointment of guardian 49

HEALTH & HEALTH DEPARTMENT:

Must determine whether county expenditure is within meaning of "public health" 71

Public health work—Counties authorized but not required to appropriate funds for 80

INFERIOR COURTS:

Clerk of circuit court acting as ex officio clerk of—Preliminary hearings—No fee for attending 32

Tuscaloosa County—Non-support cases appealed to circuit court—State witnesses not entitled to attendance fee 61

INSANE PERSONS:

In purview of Title 21, Sections 98-102 49

Judge of Probate—No authority to act under Title 21, Sections 98-102, unless adjudicated insane 49

Provisions of Title 21, Section 101, apply to insane persons as well as minors 49

JEFFERSON COUNTY:

Merit System—Payment of accumulated vacation earned by deceased employee 21

INDEX—Continued

Page

LICENSES:

Beauty parlors—Person engaged in business of hair dressing in homes subject to 82
Title 51, Sections 473 and 549 distinguished 82
Wholesale and retail vendors of watermelons and cantaloupes only not liable for fruit dealer's license 9

MERIT SYSTEM:

Jefferson County—Deceased employee—Payment of accumulated vacation 21

MINORS:

Provisions of Title 21, Section 101, apply to minors as well as insane persons 49

MOBILE COUNTY:

Tax Collector—Payment of salary of Tax and License Inspectors in office of Assessor 75

MUNICIPALITIES:

Cash bail—Ordinance may be adopted providing for 52
Cash bail—Police officer cannot accept, in absence of statutory authority 52
Planning Commission—"master plan"—Zoning authority outside corporate limits 34
Property leased from city—Improvements by lessee—Exemption from taxation 62
Public health work—Requirements of cities to appropriate funds for 80
Rest rooms—May construct and maintain 71
Zoning outside corporate limits—Not authorized by ordinance 34

NEWSPAPERS:

Public notices—Claims for publication must be filed within twelve months 12

NOTICES:

Public—Claims for publication must be filed within twelve months 12

OPINIONS OVERRULED, MODIFIED & DISTINGUISHED:

Quarterly Report, Vol. 15, p. 294 5
Quarterly Report, Vol. 24, p. 102 84

INDEX—Continued

Page

PICKENS COUNTY:

Act No. 294, Local Acts 1943, p. 178, authorizing relief to family of deceased county employee constitutional 41

PLANNING COMMISSION:

"Master plan"—Authority to zone outside corporate limits 34

PLANNING & ZONING:

Planning Commission—"master plan"—Zoning powers outside corporate limits 34

PRELIMINARY HEARINGS:

Inferior courts—Circuit clerk acting as ex officio clerk of—No fee for attending 32

PROBATION:

Circuit clerk—Entitled to fee even though probation refused 59

PUBLIC SAFETY DEPARTMENT:

Driving while intoxicated—Suspension of drivers license on appeal 87
Person under 16 may not operate motor vehicle upon public highways 26

PUBLIC WELFARE:

Adoption of children—Establishment of legal residence 40

REWARDS:

Distilling cases—Informer's fee—Defendant sentenced to penitentiary—Payment from convict fund 23

SALES TAX:

Execution issued by Department of Revenue—Circuit clerk—Sheriff should not collect cost for 37

SCHOOLS:

County Superintendent of Education subject to Teachers Retirement System 16
County Superintendent of Education—Elected before operative date of Teachers Retirement System not compelled to retire at 70 16
Teachers' applications—Expense of securing must be paid by county governing body 15

INDEX—Continued

Page

SOLICITORS:

Postoffice box—Payment of rent by State 19

SHERIFFS:

Attachment—Failure of defendant to make replevy bond—Possession of property 78
Circuit clerk—Execution issued by Department of Revenue—No costs collected for 37
County courts—Drivers' license cases—Entitled to fee for serving subpoenas 64
Distilling cases—Informer's fee—Defendant sentenced to hard labor for county—Payment by county 23
Distilling cases—Informer's fee—Defendant sentenced to penitentiary—Payment from convict fund 23
Entitled to attendance fee when attending county court receiving pleas of guilty 55

STATUTES:

Act No. 294, Local Acts 1943, p. 178, authorizing relief to family of deceased county employee, constitutional 41

TAXATION:

Ad valorem—Personal property—Publication of list of insolvents 56
Alabama Boys Industrial School—Not subject to tax levied by city of Birmingham 45
Property leased from city—Improvements by lessee—Exemption from taxation 62

TAX ASSESSORS:

Commissions—Special taxes levied by Local Act under Constitution 1901, Section 215 84
List of insolvents—Publication of 56
Mobile county—Payment by Tax Collector of salary of Tax and License Inspectors 75

TAX COLLECTORS:

Commissions—Special taxes levied by Local Act under Constitution 1901, Section 215 84
Mobile County—Payment of salary of Tax and License Inspectors in office of Assessor 75

TEACHERS:

Superintendent of Education elected before operative date of Teachers Retirement System not compelled to retire at 70 16

INDEX—Continued

Page

TRAVELING EXPENSES:

Employees—Docks Commission—Not limited by Title 41, Section 154, as amended 28

VETERANS:

Incompetent—Payment of expense of transportation to veterans hospital 5

WINSTON COUNTY:

Highway Board—Payment of rent of office space 67

WITNESSES:

County courts—Drivers' license cases—Entitled to civil fees 64

Inferior Court Tuscaloosa County—Non-support cases appealed to circuit court—Not entitled to attendance fee 61